EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 7978

Vol. 1912

In the United States Circuit Court of Appeals

For the Ninth Circuit.

MERCHANTS RACKING CO., a corporation,

Appellant,

vs.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, individually and as acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant:

CLAUDE I. PARKER, Esq.,
RALPH W. SMITH, Esq.,
J. EVERETT BLUM, Esq.,

Bank of America Building,

Los Angeles, California.

For Appellees:

PEIRSON M. HALL, Esq.,
United States Attorney,

CLYDE THOMAS,
Assistant United States Attorney,
Federal Building,

Los Angeles, California

United States of America, ss.

To Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, Defendant and Peirson M. Hall, U. S. Attorney for the Southern District of California and Clyde Thomas, Assistant U. S. Attorney for the Southern District of California, his Solicitor and Counsel, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 12th day of October, A. D. 1935, pursuant to an Order allowing an Appeal filed and entered on the 7th day of Sept., 1935, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Suit, being Equity, No. 702-J, Merchants Packing Company, a corporation, plaintiff and you are defendant and appellee to show cause, if any there be, why the Order vacating the temporary injunction rendered against the plaintiff and appellant as in the said Order Allowing Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 13th day of September, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth.

Paul J. McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Received copy of within this 13th day of Sept. 1935 Clyde Thomas, Asst. U. S. Atty. atty for defendants. Filed Sep. 13, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

MERCHANTS PACKING CO., a corporation, Plaintiff, vs. NAT ROGAN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, E. H. COHEE, INDIVIDUALLY AND AS ACTING COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, and GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Defendants.	In Equity No. 702 J BILL OF COMPLAINT IN INJUNCTION

Comes now the plaintiff and complains of the defendants and alleges:

I.

That plaintiff now is and has been at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in Los Angeles.

California, and is a resident of the Southern Ditsrict of California, Central Division.

II.

That the defendant, NAT ROGAN, is the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, E. H. COHEE, is the duly designated acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, GUY T. HELVERING, is the duly appointed, qualified and acting Commissioner of Internal Revenue and a resident of Washington, D. C.

III.

That plaintiff is engaged in the business of buying, at its plant in Los Angeles, California, hogs, cattle and other live stock, slaughtering the same and converting and packing same into food products and selling said food products so converted and packed in its trade territory, which trade territory is wholly within the State of California. That all of its purchases, all of its sales, and all of its business is transacted within the State of California and that it is not engaged in any interstate commerce or business either directly or indirectly nor does any of plaintiff's business affect interstate commerce either directly or indirectly.

IV.

That this is an action brought to enjoin the assessment of certain so-called processing taxes about to be assessed against the plaintiff by the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, and the collection of said taxes after assessment, all as provided in that certain act known as the Agricultural Adjustment Act of May 12, 1933, adopted by the Congress of the United States, all as more particularly hereinafter alleged.

V.

That on or about the 12th day of May, 1933, the Congress of the United States adopted an act known as the Agricultural Adjustment Act of May 12, 1933, and that said act was thereafter amended on April 7, 1934, May 9, 1934, June 19, 1934, and June 26, 1934, said act being Title 1, Chapter 25, Act of May 12, 1933; U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive.

VI.

That under and by virtue of the terms of said Agricultural Adjustment Act the declared policy of Congress as shown by Section 2 thereof is as follows:

"1. To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farms buy equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the pre-war period of August, 1909-July, 1914. * * *

2. To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumption demands in domestic and foreign markets.

3. To protect the consumer's interest by readjusting farm production at such level as will not increase the percentage of the consumer's retail expenditures for agricultural commodities or products derived therefrom which is returned to the farmer above the percentage which was returned to the farmer in the pre-war period, August, 1919-July, 1914."

VII.

That said Agricultural Adjustment Act further provides that processing taxes are to be levied, assessed, and collected on the first domestic processing of the commodity and are required to be paid by the processor. That the plaintiff is a processor of hogs and as hereinafter alleged has been required to pay a monthly processing tax fixed by the Secretary of Agriculture with respect to hogs slaughtered by it, and is now threatened with the payment of additional monthly processing taxes so fixed by the Secretary of Agriculture with respect to hogs slaughtered by it.

VIII.

That under and by virtue of the terms of said Agricultural Adjustment Act and the amendments thereto power is attempted to be conferred upon the Secretary of Agriculture—

(a) To agree with producers upon reduction in acreage or reduction in production of any basic agricultural commodity.

(b) To provide rental or benefit payments in connection therewith "in such amounts as the Secretary deems fair and reasonable".

(c) To enter into marketing agreements with processors, association of producers, and others.

(d) To put into effect processing taxes at rates determined and altered by him from time to time but only when the Secretary has first made a determination that rental or benefit payments are to be made with respect to any basic agricultural commodity.

(e) To make regulations to carry out his powers and a penalty for the violation of such regulations is prescribed in the sum of not over $100.00.

(f) To make exemptions from processing taxes when, in the Secretary's judgment, processing taxes are unnecessary to effectuate the declared policy of the Act.

(g) To add to the list of basic agricultural commodities provided in said Act such additional agricultural commodities as the Secretary may determine to be in competition with the commodities set forth in said Act at such time or times as the said Secretary shall determine that the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof.

IX.

That said Agricultural Adjustment Act further provides that in determining the amount of processing tax to be assessed against any such processor the tax shall be

at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that (1) if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks in the commodity products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties and if thereupon the Secretary finds that any such result will occur, then the processing tax or the processing of the commodity generally or for any designated use or uses or as to any designated product or products thereof for any designated use or uses shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. * * *"

"(c) For the purposes of Part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power with respect to articles farmers buy as such commodity had during the base period specified in Section 2 (August, 1909-July, 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Said Agricultural Adjustment Act further provides, in Section 12 (b), that in addition to the specific sums appropriated by Congress to carry out said act that the

proceeds derived from the taxes imposed under said Act are thereby appropriated to be available to the Secretary of Agriculture "for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: administrative expenses, rental and benefit payments and refunds on taxes".

That said Act further provides that among other things hogs are a basic agricultural commodity.

X.

That acting under said Agricultural Adjustment Act the Secretary of Agriculture has made the following determinations and entered the following orders fixing the amount of processing taxes, to wit:

(a) As of August 17, 1933 he proclaimed that benefit payments were to be made with respect to hogs, as basic agricultural commodity.

(b) That he determined from statistics of the Department of Agriculture that the difference between the current average farm price of hogs for the base period, August, 1909-July, 1914, and the fair exchange value of hogs as of November 5, 1933 was $4.21 per hundred pounds live weight.

(c) That he held a hearing in Washington on September 5, 1933 and after said hearing determined that the imposition of a processing tax of $4.21 per hundred pounds live weight would result in an accumulation of surplus stocks of hogs or the products thereof or the depression of the farm price of hogs, and determined that the following rates of processing tax would prevent such results: 50 cents per hundred pounds live weight effective as of November 6, 1933; $1.00 per hundred pounds

live weight effective as of December 1, 1933; $1.50 per hundred pounds live weight effective as of January 1, 1934; $2.00 per hundred pounds live weight effective as of February 1, 1934. That thereafter and with the approval of the President, the said Secretary of Agriculture made a determination as of December 21, 1933 wherein and whereby the rate of the processing tax on the first domestic processing of hogs as of January 1, 1934 shall be $1.00 per hundred pounds live weight; as of February 1, 1934, $1.50 per hundred pounds live weight; as of March 1, 1934 $2.25 per hundred pounds live weight, which said rate of $2.25 per hundred pounds live weight is now and ever since the said March 1, 1934 has been in full force and effect.

XI.

That there has been levied and assessed against the plaintiff herein as a first domestic processor of hogs, under the terms of said Agricultural Adjustment Act and the administrative orders of the Secretary of Agriculture on all hogs slaughtered by plaintiff, and that plaintiff has paid on account of such processing tax to the Collector of Internal Revenue for the Sixth Internal Revenue District of California the total sum of $81,803.96 on account of hogs processed and slaughtered by it. That so long as said Agricultural Adjustment Act is enforced there will be levied and assessed against the plaintiff processing taxes based upon its average monthly slaughter of hogs, if the tax is continued, at the rate of $2.25 per hundred pounds live weight of the approximate average monthly amount of $5,000.00. That the failure of the plaintiff to pay said processing taxes as and when due

will result in the imposition of the following penalties against it:

(a) A penalty of interest at the rate of one per cent (1%) per month from the due date of each monthly installment of said tax.

(b) A penalty of five per cent (5%) of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the Collector of Internal Revenue, said penalty being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent (1%) per month.

(c) After a second ten-day notice, the Government is authorized under the provisions of the applicable law, if the tax is not paid, to file liens against any and all of plaintiff's property and to distrain the plaintiff's property, including its plant, inventory, cash on hand, and other assets, for the purpose of realizing the amount of the tax and penalties.

XII.

That the said Agricultural Adjustment Act, in so far as it authorizes the imposition, levy, assessment and collection of processing taxes against the plaintiff, is void, invalid and beyond the powers granted to Congress by the Constitution of the United States and violates the provisions of the Constitution of the United States in the following parts:

1st: The Agricultural Adjustment Act violates the Fifth Amendment to the Constitution of the United States in that it takes the plaintiff's property without due process of law, for the reason that the processing tax goes into effect only when and in the event that the Secretary of

Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity and ceases at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. That the so-called processing tax is therefore not a tax at all but is in effect the taking of property of the plaintiff and other processors for the benefit of another class of citizens.

2nd: That the said Agricultural Adjustment Act violates the Tenth Amendment of the Constitution of the United States in that it is not adopted in pursuance of any power expressly or directly granted to the Congress by the Constitution of the United States and that the matters in said Act attempted to be regulated are not matters which come within the purview of any power so delegated to Congress by the Constitution of the United States and is therefore reserved to the States respectively or to the people. That the declared policy of the Act shows that the matters therein attempted to be regulated and the results to be obtained are matters which are within the exclusive jurisdiction of the States or the people and not within the jurisdiction of the Congress of the United States.

3rd: That the Agricultural Adjustment Act violates Article 1, Section 8, of the Constitution of the United States in that it is not a tax or a duty or an imposition or an excise as therein contemplated, for the reason that the so-called processing tax is not a tax for the benefit of the Government but is an arbitrary exaction from plaintiff and other processors for the benefit of certain farmers and producers and is to be assessed and collected only

where it is found and determined by the Secretary of Agriculture that a necessity exists for the payment of rental or other benefits to such farmers or producers.

4th: That the powers attempted to be granted by the Congress of the United States to the Secretary of Agriculture by the said Agriculture Adjustment Act are legislative functions to be exercised by the Congress of the United States alone. That such legislative functions and power can not be delegated by the Congress to the Secretary of Agriculture or any one else. That specificallly said Agricultural Adjustment Act attempts to delegate to the Secretary of Agriculture the power to determine and fix the rate of the processing tax and the necessity therefor when such processing tax shall cease to be levied and collected, what agricultural commodities shall be subject to the tax and who shall pay the same. That there is no formula or standard set up by the Congress according to which the Secretary of Agriculture shall act for the reason that the formula or standard therein attempted to be prescribed is uncertain, indefinate, and the factors upon which such determination are to be based are variable and impossible of exact or definite ascertainment. That the method of computation of said tax is indefinite and vague and the amount of the tax provided for is incapable of specific determination under the terms of said act; that there is no definition of the essential terms the determination of which the Secretary of Agriculture is to make in calling the said processing tax into being and fixing the rate thereof and for the further reason

that the attempted standard or formula, that is to say, that level which equals the difference between the current average farm price for the commodity and the fair exchange of value of the commodity, is destroyed by the exception that follows such formula or standard as provided in Section 9 (b) of said Act.

5th: That by the terms of said Agricultural Adjustment Act said Act is only to affect persons engaged in interstate commerce or whose business affects interstate commerce directly or indirectly and that plaintiff is not one of the persons therein contemplated to be liable for the processing tax, for the reason as aforesaid that plaintiff's business is entirely intra-state and none of it is interstate. That Congress has no power or authority to regulate intra-state business.

6th: That the said Agricultural Adjustment Act is not being carried out as provided in its terms as said Secretary of Agriculture should carry it out, for the reason that the rate fixed by said Secretary of Agriculture for the months of January, February, March, April, and May, 1935, at the rate of $2.25 per hundred pounds live weight for hogs is invalid and void for the reason that said rate has been fixed and established by the Secretary of Agriculture in complete disregard to the so-called formula prescribed by said Agriculture Adjustment Act for the establishing of such rate. As calculated and determined from the statistics of the Department of Agriculture the fair exchange value of pre-war parity farm price for hogs, the actual farm price for hogs, and the

excess of pre-war parity over the actual price for hogs for said months hereinabove enumerated are as follows:

1935	Fair exchange value or pre-war parity farm price for hogs.	Actual farm price for hogs.	Excess of pre-war parity of farm over actual prices.
Jan.	$9.10	$6.87	$2.23
Feb.	9.17	7.10	2.07
Mar.	9.24	8.10	1.14
Apr.	9.24	7.88	1.36
May	9.24	7.92	1.32

That the above set out figures show that there is no basis on which a processing tax at the rate of $2.25 per hundred pounds live weight of hogs can be levied or collected. That the action of the Secretary of Agriculture in establishing the rate of $2.25 per hundred pounds live weight is without foundation and against fact and is not justified by the Act even if it were valid. That said action of the Secretary of Agriculture will be continued in the future and that plaintiff will be required to pay large sums of money as processing taxes which are wholly unnecessary, in order to bring the purchasing power with respect to articles which farmers buy to the level of such purchasing power in the base period. That the action of the Secretary of Agriculture in this respect is unwarranted, arbitrary and contrary to the so-called formula or standard set out by said Act and adopted by the Secretary of Agriculture for the levying of such processing taxes on hogs.

XIII.

That there is about to be assessed against plaintiff herein a processing tax in the sum of $2,934.16 for the month of May, 1935, and a sum of money at this time

not known to plaintiff for the month of June, 1935, and for all of the months subsequent thereto during which time the Agricultural Adjustment Act shall remain in force. That upon the assessment thereof plaintiff will become liable for the payment thereof and will be forced to pay the same to the defendant, E. H. COHEE, as acting Collector of Internal Revenue for the Sixth District of California, and to NAT ROGAN, as Collector of Internal Revenue for the Sixth District of California, or to either of them. That unless the de-defendant, GUY T. HEVERING, as Commissioner of Internal Revenue, is enjoined from the assessing of said taxes about to be assessed or hereafter to be assessed, and unless the defendant, E. H. Cohee, individually and as acting Collector of Internal Revenue for the Sixth District of California, and Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, is enjoined from collecting such taxes, plaintiff will have to pay the same and in the event of nonpayment, be subject to the penalties hereinabove set forth.

XIV.

That plaintiff seeks the relief herein prayed for in equity for the reason that plaintiff has no speedy or adequate remedy at law for the reason that plaintiff can not file a claim for refund after payment of taxes and in the event of the rejection thereof file suit for the return of such taxes, for the reason that a judgment obtained thereon would be of no force or effect because the Congress of the United States has made no appropriation for the payment of any such refunds. That although the Act as it now stands provides that refund shall be paid out of

the taxes as collected, plaintiff is informed and believes and therefore alleges that the amounts expended by the Secretary of Agriculture far exceeds the amounts appropriated by the Congress for the carrying out of said Act and the amount of taxes collected by reason of said processing taxes, so that the said Secretary of Agriculture or the Treasurer of the United States have no funds out of which to pay such refunds in the event plaintiff should obtain a judgment for the refund of the taxes paid.

That further plaintiff is informed and believes and therefore alleges that there is now pending in the Congress of the United States an act to amend the Agricultural Adjustment Act wherein it will be provided that no claim for refund shall be filed for any of the processing taxes theretofore paid nor shall any suit be maintained for the return or refund of any such taxes theretofore paid.

That plaintiff is informed and believes and therefore alleges that should he pay said tax at this time there would be no remedy at law available for him and therefore no adequate remedy at law to obtain the return or refund of said taxes theretofore paid. That plaintiff is further informed and believes and therefore alleges that the defendants and none of them could respond to a judgment obtained by plaintiff against them for the wrongful collection of the taxes herein sought to be enjoined, in the event this Act would thereafter be declared unconstitutional or void.

That plaintiff is informed and believes and therefore alleges that unless the defendants are restrained from the assessment and collection of the taxes herein set forth the said defendants will file or cause to be filed liens

against the property of plaintiff which will, in the very nature of said liens be a restraint upon plaintiff's right to deal in and with its property as freely as it could have dealt therewith before the filing of any such liens and will wholly destroy the value of plaintiff's property and plaintiff's business. That said liens will attach to the inventory of plaintiff so that plaintiff from the date of the filing of said lien will be unable to sell any of its inventory, including its hogs, and by-products thereof and food products made therefrom. That plaintiff is further informed and believes and therefore allleges that unless the defendants are restrained from the collection of said taxes said defendants will have the right to and will attempt to collect said taxes by distraint and by seizing the property of plaintiff. That the filing of any such liens or the distraint and seizure of plaintiff's property will involve repeated and continuous acts of trespass upon the property of said plaintiff by said defendants and defendants will employ numerous agents and servants to perform said acts of trespass. That as a result of any such distraint and seizure of the property of plaintiff herein there will be repeated breaches of peace if defendants are permitted the right to collect such taxes by such methods or any or either of them. That the defendants nor any of them have a financial responsibility near equal to the value of plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by the defendants, and if the defendants are permitted to continue and not be restrained from continuing their attempt

to collect said taxes plaintiff will suffer irreparable damage and the defendants will be unable to respond to plaintiff in damages. That plaintiff will have no way nor manner within which to recoup its losses or damages. That unless the said defendants are restrained as herein prayed for there will be a multplicity of suits all of which can be avoided by the granting by this Court of an injunction enjoining the defendants or any or either of them or their servants or agents from doing or attempting to do any of the acts herein sought to be enjoined.

XV.

That no issue of fact will or can be tendered by defendants. That it affirmatively appears from the said Agricultural Adjustment Act of May 12, 1933 that said Act is unconstitutional and void and that the plaintiff herein is therefore not liable for the payment of any of the said taxes herein sought to be enjoined.

WHEREFORE, plaintiff prays that the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, be enjoined and restrained from assessing any processing taxes against this plaintiff and that the defendants E. H. COHEE, individually and as acting Collector of Internal Revenue for the Sixth District of California, and NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, be enjoined and restrained from collecting or attempting to collect any of the said processing taxes, whether by distraint, levy, action at law or in equity or otherwise, and that the said defendants be restrained from filing a lien against plaintiff's property by reason of said taxes and that the said defendants be restrained from distraining or seizing plaintiff's property in an attempt to enforce the

payment of said taxes. That the defendants be enjoined and restrained from possessing themselves of plaintiff's property or any of it. That this Honorable Court issue its preliminary injunction upon the filing of plaintiff's complaint herein and that a time be set for the hearing thereon and that at such trial said preliminary injunction be made permanent, forever enjoining and restraining said defendants, their officers, servants, agents, solicitors, attorneys ,or succcessors in office, or any or either of them, from assessing the said tax herein complained of or from collecting or attempting to collect said taxes or any part thereof or from filing any liens against plaintiff's property by reason thereof or from distraining and seizing plaintiff's property, or in any way disturbing the quiet and peaceful possession of plaintiff in the free use of its property. That an Order to Show Cause be made herein and served upon the said defendants, requiring them to show cause at a date certain why they should not be permanently restrained and enjoined from committing the acts, or any of them, herein complained of, and that a subpoena be directed to said defendants to answer the premises and to stand to and abide by such order and decree.

That this Honorable Court do render its declaratory judgment herein, declaring the said Agricultural Adjustment Act of May 12, 1933 unconstitutional and void for the reasons stated in plaintiff's complaint herein, and that the said Court further declare that the administration of said Act by the Secretary of Agriculture is illegal, invalid and void for the reason that said Act is not being admin-

istered according to its terms and conditions as set forth in plaintiff's complaint, and for such other and further relief as to this Court may seem just and equitable in the premises.

CLAUDE I. PARKER AND
RALPH W. SMITH,

By Ralph W. Smith
Attorneys for Plaintiff.

State of California)
) ss.
County of Los Angeles)

MOSE FOORMAN, being by me first duly sworn, deposes and says: that he is the Secretary and Treasurer of the MERCHANTS PACKING CO., a corporation, the Plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

[Seal] Mose Foorman

Subscribed and sworn to before me this 28th day of June, 1935.

[Seal] Marguerite Le Sage
Notary Public in and for the County of Los Angeles. State of California

[Endorsed]: Filed Jul 3 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

MOTION TO DISMISS

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and move the court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I

That the court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complainant has a plain, adequate and complete remedy in the ordinary course at law.

II

That the United States of America is a real party in interest and it may not be sued without its consent.

III

That there is no actual controversy between complainant and these defendants, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V

That the proceeding attempted to be instituted by this Complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney,

Attorneys for Defendants
NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within motion to dismiss this 10 day of July 1935. Claude I. Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas Deputy Clerk.

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, allege:

I

That the defendants are, and each of them is, a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II

That the duties of said defendants are to collect taxes levied under the Internal Revenue Laws of the United States.

III

That the complaint in the above-entitled case seeks to enjoin defendants from collecting taxes levied under and by the Internal Revenue laws of the United States.

IV

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax.

V

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

Dated: This 10 day of July, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney,

Attorneys for defendants
NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within Objections to the Granting of a Preliminary Injunction this 10 day of July 1935, Claude I Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Saturday the 27th day of July in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: WILLIAM P. JAMES, District Judge.

THE LUER PACKING COMPANY,	)	
	)	
Plaintiff,	)	
	)	No. Eq.-708-J
vs.	)	
	)	
NAT ROGAN, Collector,	)	
Defendant.	)	

Plaintiff brought this suit for an Injunction and for declaratory relief; Injunction is prayed for to restrain the defendant Collector from enforcing collection of the processing tax levied under the provisions of the Federal Agricultural Adjustment Act of May 12, 1933; it being asserted that the law violates provisions of the Constitution of the United States, particularly that legislative power possessed solely by the Congress is attempted to be delegated to the Secretary of Agriculture. A speedy and adequate remedy at law is alleged to be lacking. An order to show cause why a Temporary Injunction should not issue brought the defendant Collector into court. The Collector, represented by the United States Attorney, on

the return day, took no issue with the facts pleaded in plaintiff's verified petition but interposed a motion to dismiss the suit based upon the ground that under the provisions of Section 154, Title 26, U. S. C. no injunction may issue to prevent the collection of any tax. The application for temporary injunction was submitted for decision subject to the motion to dismiss. The Court now, having considered the matter, makes its decision and causes same to be entered on the minutes of the court, as follows: The rule is recognized as well established, that the provisions of Section 154 as noted, will prevent an Injunction issuing to restrain the collection of a tax unless, in addition to a showing of the probable invalidity of the law under which the right to collect same is claimed, there be shown special facts from which it appears that the remedy at law available to the taxpayer does not furnish speedy and adequate relief or that a multiplicity of suits will result which can be avoided through the use of the equitable action. The Court, from the facts alleged and admitted by the defendant for the purposes of the application for Temporary Injunction, concludes that there is grave doubt as to the constitutionality of the act in question, which appears from an examination of its terms and provisions as well as by the fact that it has been already held invalid by the Circuit Court of Appeals for the First Circuit, and the United States District Court for the District of Minnesota, upon reasoning similar to that found in recent decisions of the Supreme Court of the United States. The Court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an Injunction, exclusive of any consideration of the fact that Congressional action is threat-

ened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the Court can give small weight because of its speculative and conjectural character. It is concluded that because of the serious doubt as to the constitutionality of the law, together with the fact that a multiplicity of suits must inevitably result, (necessary to be brought by plaintiff if it is relegated to its remedy at law to protect its rights,) Injunction should issue, as was held proper under similar findings in Lee v. Bickell, 292 U. S. 415-421. Separately considered, declaratory relief may be awarded as was decided by Judge Tuttle in the District Court of Michigan in Black v. Little, 8 Fed. Supp. 867, wherein he cites applicable reasoning in Nashville, C. & St. L. Ry v. Wallace, 288 U. S. 249. Preliminary Injunction will issue as prayed for, provided plaintiff furnish security to the defendant by undertaking with sufficient sureties in the sum of $75,000.00 that it will pay all taxes chargeable on the account referred to, together with all costs assessed by the court in the event it is finally decided that Injunction was improperly issued or this action is dismissed. In lieu of an undertaking, plaintiff shall have the option to deposit the amount fixed in money with the Clerk of the Court, subject to like conditions. The court reserves the right to require added security to be given from time to time as may seem necessary to protect the defendant, or to modify the aforesaid order in any part or particular after notice to the parties. The motion of defendant to dismiss is denied. Defendant is allowed 15 days after notice hereof within which to answer the bill of complaint. An exception is noted in favor of defendant to the making of this order.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Saturday the 27th day of July in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: WM. P. JAMES, District Judge.

MERCHANTS PACKING CO.,	)	
	)	
Plaintiff,	)	
vs.	)	No. Eq.-702-J
	)	
NAT ROGAN, Collector, et al.,	)	
	)	
Defendants.	)	

The facts and law applicable to plaintiff's application for preliminary injunction and the motion to dismiss presented by defendants Rogan and Cohee are like those considered in the Order made this day in The Luer Packing Company, plaintiff, vs. Rogan. For the reasons given in the latter order which are adopted for the purposes of this case, the application for temporary injunction is granted and the motion of the defendants named to dismiss is denied. Security to be furnished in this case as a condition to the issuance of Injunction is fixed at the sum of $10,000.00 cash, or by an undertaking conditioned as is required in the Luer Packing Company case order. An Exception is noted in favor of defendants. Fifteen days is allowed defendants to answer.

[Title of Court and Cause.]

PRELIMINARY INJUNCTION.

WHEREAS, in the above entitled cause the verified Bill of Complaint for preliminary injunction and declaratory relief has been filed; and

WHEREAS, the temporary restraining order has been granted; and

WHEREAS, the defendants Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, have appeared and filed their motion to dismiss the bill of complaint filed herein; and

WHEREAS, the matter came on regularly for hearing on said application for preliminary injunction and motion to dismiss on the 11th day of July, 1935, at the hour of ten o'clock a. m. thereof before the above entitled Court, in the courtroom of Judge William P. James; and

WHEREAS, said matter having been argued fully by the plaintiffs through their attorneys, Claude I. Parker and Ralph W. Smith, by J. Everett Blum, and by the appearing defendants through their attorneys, Pierson M. Hall, United States Attorney, and Clyde Thomas, Assistant United States Attorney; and

WHEREAS, it appears from said bill of complaint and from the argument had on said application for preliminary injunction and said motion to dismiss that unless a preliminary injunction is granted herein that immediate and irreparable injury, loss, or damage will be caused to plaintiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be de-

stroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants; and

WHEREAS, the Court has been fully advised and points and authorities submitted on behalf of both parties hereto and the matter having been submitted to the Court for its decision;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the application for the preliminary injunction prayed for is hereby granted and the motion of the appearing defendants to dismiss is denied.

IT IS FURTHER ORDERED that said preliminary injunction issue and that said appearing defendants, Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, and E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and their respective agents, servants, attorneys, solicitors and officers, are and each of them hereby is restrained and enjoined from:

(a) Collecting or attempting to collect from plaintiff such or any processing tax, whether by distraint, levy, action at law or in equity;

(b) Imposing or giving notice of intention to impose or causing to be imposed or filed any lien upon the property of plaintiff, whether real or personal; or

(c) In any other manner collecting or attempting to collect said tax.

That this preliminary injunction is based upon the grounds that unless the same is granted that immediate and irreparable injury, loss, or damage will be caused to plaintiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be destroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff is to furnish security in this case as a condition to the issuance of the injunction in the sum of $10,000.00 cash or in lieu thereof an undertaking by good and sufficient surety in the sum of $10,000.00, conditioned upon the payment of all taxes chargeable against the plaintiff herein, together with all costs assessed by the Court, in the event it is finally decided that the injunction is improperly issued or this action is dismissed.

It is further ORDERED, ADJUDGED AND DECREED that the plaintiff continue to file its processing tax returns on the forms provided therefor by the Collector of Internal Revenue with the defendant Collector of Internal Revenue on all hogs processed.

It is further ORDERED, ADJUDGED AND DECREED that the Court reserves the right to require additional security to be given from time to time as may seem necessary to protect the defendants and the Court also

reserves the right to modify this order in any part or particular after notice to the parties.

It is further ORDERED, ADJUDGED AND DECREED that this preliminary injunction remain in force until the final determination of this matter or until further order of the Court.

It is further ORDERED that the defendants shall be and hereby are allowed fifteen (15) days after notice hereof within which to answer the bill of complaint.

It is further ORDERED that an exception is allowed to the defendants with respect to this order.

Dated this 9th day of August, 1935.

Paul J. McCormick
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM;
CLAUDE I. PARKER AND RALPH W. SMITH,
By J Everett Blum
Attorneys for Plaintiff.

Pierson Hall
PIERSON M. HALL, United States Attorney.

Clyde Thomas
CLYDE THOMAS, Assistant United States Attorney.
Attorneys for Appearing Defendants.

[Endorsed]: Filed Aug 9—1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

[Title of Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff and files herein amendments to its complaint as follows, to wit:

I.

That there be added to said complaint a paragraph numbered XVI as follows:

"XVI.

The amount in controversy involved herein is in excess of $3,000.00. That there is a diversity of citizenship in that the plaintiff is a resident and citizen of the State of California and one of the defendants, Guy T. Helvering, Commissioner of Internal Revenue, is a resident and citizen of Washington, D. C."

II.

That said complaint be deemed to be amended so as the title of said complaint will read "Bill of Complaint in Injunction and for Declaratory Judgment."

CLAUDE I. PARKER AND
RALPH W. SMITH,

By J. EVERETT BLUM
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Amdt to Compl this 10 day of July 1935 Peirson M. Hall

Filed Jul 11 1935 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk.

[Title of Court and Cause.]

SECOND AMENDMENT TO COMPLAINT.

Leave of Court first being had and obtained plaintiff herein files this the second Amendment to its complaint and amends its complaint by adding thereto the following paragraph to be known as paragraph "XVIII".

XVIII.

That the plaintiff herein has continuously, during the past several years, operated, maintained and conducted its business in a business-like, workmanlike and efficient manner and that plaintiff has, during the times herein mentioned, continued to so conduct, operate and maintain its business. That prior to the time that said processing tax was levied against plaintiff, plaintiff continuously showed a profit from its pork and packing business. That since the assessing and levying of said processing tax against the plaintiff plaintiff's profit from said pork packing business has been diminishing until at the time of filing plaintiff's complaint herein and for some time prior thereto plaintiff actually showed a loss from the operation of said pork packing business. That said diminishing returns and the loss from said pork packing business is directly, solely and only attributable to the assessment, levy and collection of said processing tax. That plaintiff has been unable to pass said tax on to the retailer or to the consumers of pork and has had to absorb the same and bear the loss therefrom. That plaintiff's profit in the pork business

depends upon volume and that plaintiff has no control of and can not control the consumer market nor the consumer resistance to prices. That plaintiff's overhead and the slaughtering and processing of hogs and pork is substantially a fixed overhead expense. That upon a reduction in the volume of hogs slaughtered there is not a corresponding reduction of operating expense, but that upon a reduction of hogs slaughtered there is a reduction in volume of pork sold and, consequently, a reduction in receipts therefrom. That solely by reason of said processing tax and not otherwise plaintiff has been forced to reduce the number of hogs slaughtered by reason of the Agricultural Adjustment Act affecting the price market of such hogs and the consequent reduction of retail sales and the consequent reduction of sales by plaintiff to retailers. That such reduction in sales by plaintiff has reduced the volume of sales to such extent that plaintiff for many months prior to the filing of its complaint herein has been operating its pork packing business at a loss, as aforesaid.

That plaintiff can not control the cost of the hogs which it is forced to purchase in the operating of its pork packing business. That said price of hogs being such that plaintiff can not control the same has materially increased plaintiff's cost of operation and consequently, plaintiff's prices to its retailers have had to be increased in accordance therewith, thereby resulting in a reduced consumer market. That since, as aforesaid, plaintiff must and does depend upon volume for its profit the reduction of volume

of sales results in a reduction of profit to plaintiff. That said volume has been so reduced that plaintiff is now operating at a loss and consequently, by reason of said consumer market resistance plaintiff has been unable to pass said tax on to its retailers or to the consumers. That plaintiff's losses are attributable solely and only to said Agricultural Adjustment Act and the processing tax levied thereunder and not in any manner to the manner in which plaintiff conducts, operates and maintains its business.

WHEREFORE, plaintiff prays for the relief prayed for in its complaint.

Claude I. Parker
Ralph W. Smith
J. Everett Blum
Attorneys for Plaintiff.

[Verified.]

[Endorsed]: Filed Sep 6 - 1935 R. S. Zimmerman Clerk By Robert P Simpson Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING THE FILING OF SECOND AMENDMENT TO COMPLAINT

THAT, WHEREAS, the facts alleged in plaintiff's Second Amendment to Complaint were deemed to be before the Court during all stages of the above entitled action, and particularly before the Court upon the motion of the defendants to vacate the Preliminary Injunction theretofore granted, and the Court having considered such facts in the granting of the defendants' motion;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff be and it hereby is allowed to file its Second Amendment to Complaint, with the same force and effect as though the plaintiff's complaint had contained said allegations at the time the Government's motion to vacate plaintiff's preliminary injunction came on for hearing before the Court.

Dated September 6th, 1935.

Paul J. McCormick

JUDGE OF THE ABOVE ENTITLED COURT.

[Endorsed]: Filed Sep 6 1935. R. S. Zimmerman Clerk By Robert P. Simpson Deputy Clerk.

[Title of Court and Cause.]

MOTION TO VACATE TEMPORARY INJUNCTION

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court, to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 9th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Compaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled, "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved ..... which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of $1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plain-

tiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's bill of complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22nd day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas
CLYDE THOMAS,
Assistant U. S. Attorney
Attorneys for Defendant.

[Acknowledgment]: Claude I. Parker. Ralph W. Smith By J. Everett Blum Attys for Pltf.

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman. Clerk. By B. B. Hansen, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Friday the 30th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Merchants Packing Company, a corp.,	)	
Plaintiff,	)	
vs.	)	No. Eq.-702-J
Nat Rogan, etc.,	)	
Defendant.	)	

This is a motion to vacate a Temporary Injunction. The Restraining Writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar Injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the Injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the Injunction.

It has been considered proper by the Court, because of the absence of the other judges during the regular August

vacation period of the Court, that all of the Motions to Vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the Interlocutory Injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for Temporary Injunctions in aid of pending appeals in that Court from the denial of Injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for Temporary Injunctions in equity suits brought in this Circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the Motion to Vacate the Preliminary Injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant. Dated August 30, 1935.

[Title of Court and Cause.]

SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, MERCHANTS PACKING COMPANY, a corporation, and leave of Court having been granted to file this its Supplemental Complaint, states and alleges:

I.

That the Senate and the House of Representatives of the Congress of the United States has passed certain amendments to the Agricultural Adjustment Act known as H. R. 8492 and that the President of the United States has signed said enactment and that the said Agricultural Adjustment Act is thereby amended as hereinafter in part stated.

That said act provides in Section 21 (d) (1) of said Amendment that no recovery, recoupment, refund, etc., shall be made or allowed to any taxpayer unless after a claim for refund has been duly filed it shall be established in addition to all other facts required to be established to the satisfaction of the Commissioner of Internal Revenue and the Commissioner shall find and declare of record, after due notice and hearing thereon, that the taxpayer, directly or indirectly, has not passed said tax or any part thereof on to the retailer or consumer or back to the producer, but has in fact absorbed and borne the whole of said tax, before the Commissioner shall al-

low any such claim for refund. That if said Commissioner shall reject said claim the record of the Commissioner shall be certified by him to the Court in which the taxpayer brings action upon his rejected claim for refund and such record so certified shall become and be the evidence of taxpayer's case before such Court.

Section 21 (d) (2) of said Amendment provides in part in substance, that no suit or action shall be maintained for recovery of refund, etc., unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally declared invalid, a claim for refund is filed by the person entitled thereto, and that no suit or proceedings shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time.

That the said provisions of the law as it now stands substantially effectively, and for all practical purposes and to all intents, take away from and deny plaintiff any and all remedy at law, for the reason that plaintiff is required at the outset to prove a negative in that plaintiff must prove that said tax has not been passed on or back as in said Section 21 (d) (1) provided. That such proof is not capable of being made to a certainty nor with definiteness, and particularly is such proof uncertain and indefinite in regard to plaintiff's business, to wit, pork processing, for

the reason that the processing tax is levied upon the live weight of the hog at the rate of $2.25 per cwt.; that not more than 75 per cent of said live hog is usable in the prok processing business, and that said 75 per cent of the live weight of the hog is divided into numerous portions including ham, sausage, bacon, lard, loin, hocks, feet, heads, shoulders, etc. That some of said products are pickled, some are smoked, and others go through sundry other processes, and some are sold fresh. That to allocate the proportional part of the tax so each article would be at the best of an uncertain and indefinite nature and difficult of legal proof. That plaintiff stores said various cuts and portions of said hog until sale thereof is available and different portions are necessarily marketed at different times and at greatly varying prices and that, therefore, tracing the relation of the price paid for each portion of such hog, including the processing tax, and the aggregate price obtainable upon sale of all of said portions of any one particular hog and at such various times and at different market or sales prices so as to prove the absorption or nonabsorption of the said processing tax by plaintiff would be impracticable, uncertain, indefinite, thereby rendering plaintiff's action at law incomplete, inadequate and not as plain, speedy, adequate, full or complete a remedy as equity could grant by way of injunctive relief. That further, an accounting system necessary to trace such costs to the various portions of such hog would of neces-

sity be cumbersome, weighty, costly and difficult to maintain. That such bookkeeping and accounting system would in and of itself be a sufficient bar and hazard to plaintiff's remedy at law because of such cost, inefficiency and cumbersomeness aforesaid.

II.

That each, all and every of the amendments of said Agricultural Adjustment Act embodied in H. R. 8492 and known as the Amendments of August 27, 1935, are and each of them is void, invalid and unconstitutional upon each and every of the grounds set forth in plaintiff's original bill of complaint as reasons and grounds for the invalidity and unconstitutionality of the said Agricultural Adjustment Act prior to the making and taking effect of such amendments.

III.

That since the filing of plaintiff's original Bill of Complaint the taxes for each and every of the months subsequent to the month set forth in plaintiff's original Bill of Complaint, to and including the month of August, 1935, has become due and payable and plaintiff has been threatened with distraint and seizure of his property unless said taxes are paid upon demand of the defendant. That each and every of the things alleged in plaintiff's original complaint as results of any such distraint and seizure or imposition of any liens by defendant will result to plain-

tiff if defendant's threats since the filing of said complaint are carried out and made effective. That each and every of such acts of filing and imposing liens against plaintiff's property or distraining and seizing plaintiff's property will constitute additional, continual trespass against plaintiff and plaintiff's property and will result in various and sundry breaches of the peace, which will result in a multiplicity of suits, for the reason that said tort actions could not be joined together in one action at law and plaintiff would have no adequate, plain, speedy, complete and full remedy at law, as alleged in plaintiff's original bill of complaint.

WHEREFORE, plaintiff prays judgment as set forth in his original bill of complaint and hereby incorporates herein the said prayer of his original complaint by this reference, as fully as if the same were reiterated and restated herein.

CLAUDE I. PARKER AND RALPH W. SMITH,

By J. EVERETT BLUM

Attorneys, Solicitors and Counsel for Plaintiff.

[Verified.]

[Endorsed]: Received copy of the within.....this 12th day of Sept. 1935. Peirson M. Hall, D. H.

Filed Sept. 13 1935 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 12th day of September, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

MERCHANTS PACKING CO., a corporation, Plaintiff, - vs - NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue, Defendants.	In Equity No. 702-J

These causes coming on for hearing on (1) Petitions for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases, Nos. 698-H, 708-J, 710-H, and 740-C; George M. Breslin, Esq., appearing for the plaintiffs in cases, Nos. Eq.-698-H and Eq.-708-J; Benjamin W. Shipman, Esq., appears for the plaintiff in case No. Eq.-694-C; W. Torrence Stockman, Esq., appears for the plaintiff in Case No. Eq.-710-H; John C. MacFarland, Esq., appears for the plaintiff in Case, No. Eq.-740-C; and J. E. Blum, Esq., appearing for the plaintiffs in Cases, Nos. Eq.-702-J, Eq.-703-H, and Eq.-719-C; and Philip N. Krasne, Esq., appearing for the plaintiff in Case No. Eq.-737-M, Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock p. m. counsel answer ready in all matters; following which,

George M. Breslin, Esq., makes a statement, and

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to Motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p. m., George M. Breslin, Esq., argues to the Court in support of petitions for rehearing; after which,

At the hour of 2:30 o'clock p. m. Peirson M. Hall, Esq., argues to the Court in reply thereto.

At the hour of 3:10 o'clock p. m. John C. MacFarland, Esq., makes closing argument in behalf of the plaintiffs; following which

At the hour of 3:15 o'clock p. m., J. E. Blum, Esq., makes a statement.

The Court now renders its oral opinion and orders that each Motion for rehearing be severally denied and exceptions allowed.

Upon Motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is ordered that Supplemental Bills of Complaint in Cases, Nos. Eq.-698-H and Eq.-708-J may be amended by interlineation.

[Title of Court and Cause.]

PETITION FOR APPEAL

TO THE HONORABLE PAUL McCORMICK, DISTRICT JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Your petitioner, MERCHANTS PACKING COMPANY, a corporation, plaintiff in the above entitled cause, feeling itself aggrieved by the Order on Motion to Vacate Temporary Injunction entered in the above entitled cause on the 30th day of August, 1935, which order granted defendant's Motion to Vacate plaintiff's preliminary injunction, which said injunction was granted by the above entitled Court on the 9th day of August, 1935, and by reason of the manifest errors which were committed to its prejudice, all of which are more specifically set forth in the Assignment of Errors which is filed herein, hereby prays that appeal from said Order by allowed to the United States Circuit Court of Appeals for the Ninth Circuit and that pursuant thereto citation issue as provided by law and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, to the end that the errors herein complained of may be corrected. Petitioner respectfully petitions and requests that all proceedings in the said District Court of the United States be *staid* by a supersedeas

and that plaintiff's injunction be continued in force or reinstated pending the appeal herein. That petitioner herein tenders bond in such amount as this Honorable Court may require for the purposes of this appeal.

Dated this 6th day of September, 1935.

Claude I. Parker
Ralph W Smith
J. Everett Blum
Attorneys for Plaintiff and Appellant.

[Endorsed]: Received copy of the within this 13 day of Sept. 1935 Clyde Thomas, Asst. U. S. Atty. Filed Sep 13, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

MERCHANTS PACKING COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, E. H. COHEE, INDIVIDUALLY AND AS ACTING COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, and GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Defendants.	In Equity No. 702-J ASSIGNMENT OF ERRORS

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now the plaintiff and appellant, MERCHANTS PACKING COMPANY, a corporation, and files the following assignment of errors upon which it will rely upon its petition for review of the order entered by the above entitled Court, in the above entitled cause, on the 30th day of August, 1935.

I.

That the Court erred in granting defendant's motion to vacate preliminary injunction theretofore granted plaintiff on the 9th day of August, 1935.

II.

That the Court erred in making its Order vacating the said preliminary injunction.

III.

That the Court erred in holding that plaintiff's complaint did not state facts sufficient to justify injunctive relief to plaintiff.

IV.

That the Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in Fisher Flouring Mills v. Collector, and Consolidated Cases, decided August 15, 1935, was binding upon the above entitled Court irrespective of the facts alleged in plaintiff's complaint herein involved, admitted by the defendant to be true, and which facts are wholly different and unlike the facts involved in the said Fisher Flouring Mills v. Collector, and Consolidated Cases.

V.

That the Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in Fisher Flouring Mills v. Collector, and Consolidated Cases, necessitated the vacation of the preliminary injunction theretofore granted.

VI.

That the Court erred in holding that plaintiff was not entitled to the preliminary injunction.

VII.

That the Court erred in holding that the plaintiff has a plain, speedy, adequate and complete remedy at law.

VIII.

That the Court erred in holding that the dissolution of the preliminary injunction heretofore granted by the Court will not result in a multiplicity of suits.

IX.

That the Court erred in holding that the dissolution of said preliminary injunction would not result in great and irreparable loss and damage to plaintiff.

X.

That the Court erred in holding that the dissolution of the preliminary injunction would not subject plaintiff and its officers and agents to heavy and extraordinary penalties, both criminally and civilly.

WHEREFORE, plaintiff prays that the said Order be reversed and the Circuit Court of Appeals for the Ninth Circuit render a proper order and decree on the record, and for such other and further relief as to the Court may seem just and proper in the premises.

Claude I. Parker and Ralph W. Smith
CLAUDE I. PARKER AND RALPH W. SMITH,
J. Everett Blum

Solicitors and Counsel for Plaintiff.

[Endorsed]: Received copy of the within this 13 day of Sept. 1935. Clyde Thomas, Asst. U. S. Atty. Filed Sep. 13, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND.

IT IS HEREBY ORDERED that the appeal prayed for and the petition for appeal filed in the above entitled cause be allowed; and

IT IS FURTHER ORDERED AND DIRECTED that any application by plaintiff and appellant for a Supersedeas be made to the Circuit Court of Appeals for the Ninth Circuit, or to a Judge thereof, in the form of an application for an injunction pending appeal and that appellant give a bond on appeal as security for costs, conditioned as required by law, in the sum of $250.00/100.

Dated this 13th day of September, 1935.

Paul J. McCormick
UNITED STATES DISTRICT JUDGE.

Due service by true copy admitted this 13th day of September, 1935.

Pierson M. Hall
Clyde Thomas
Clyde Thomas
Attorneys for Defendants and Appellees

[Endorsed]: Filed Sep. 13 1935 R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

STATE OF CALIFORNIA)
) SS:
COUNTY OF LOS ANGELES)

On this 13th day of September, 1935, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith

Notary Public in and for the State of California,
County of Los Angeles.

My Commission Expires February 18, 1938

Examined and recommended for approval as provided in Rule 28.

By J. Everett Blum
Attorney

Approved this 16th day of September, 1935.

Paul J. McCormick
District Judge

[Endorsed]: Filed Sep 16 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

NOW, THEREFORE, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 13th day of September, 1935.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal] By W. H. CANTWELL
(W. H. Cantwell) Attorney in Fact

Attest ROBERT HECHT
(Robert Hecht) Agent

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

You will please prepare and within thirty (30) days from the date of issue of the citation on appeal of the above entitled cause transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, duly authenticated copies of the following documents:

1. The Complaint filed by the plaintiff.

2. The motion of defendants to dismiss plaintiff's complaint.

3. The objections of the defendants to the granting of a preliminary injunction.

4. The preliminary injunction issued by the Court.

5. Plaintiff's amendment to complaint.

6. Plaintiff's Second Amendment to Complaint.

7. Order allowing plaintiff to file second amendment to complaint.

8. Motion of the defendants to vacate temporary injunction.

9. Minute Order on motion to vacate temporary injunction issued by the Honorable Paul J. McCormick, Judge of the above entitled Court.

10. Petition for appeal.

11. Order allowing appeal and fixing bond, and Admission of service thereof.

12. Cost bond on appeal.

13. Assignment of errors.

14. Citation on appeal.

15. This Praecipe for transcript of record and notice of filing same.

16. Clerk's certificate and bill of citations.

17. Plaintiff's Supplemental Complaint and Minute Order allowing the filing thereof.

The foregoing to be prepared and duly authenticated and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of September, 1935.

CLAUDE I PARKER
RALPH W SMITH
J. EVERETT BLUM

Attorneys for Plaintiff.

[Endorsed]: Received copy of the within this 13th day of Sept. 1935. Clyde Thomas, Asst. U. S. Atty. Filed Sep. 13, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 63 pages, numbered from 1 to 63, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; motion to dismiss; objections to granting of preliminary injunctions; minute order of July 27, 1935, containing memorandum of conclusions of Judge James; minute order of July 27, 1935, granting a temporary injunction; preliminary injunction; amendment to complaint; second amendment to complaint; order allowing filing of second amendment to complaint; motion to vacate temporary injunction; minute order of August 30, 1935, containing memorandum and conclusions of Judge McCormick; supplemental complaint; minute order of September 12, 1935, allowing the filing of the supplemental bill of complaint; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal, notice of filing praecipe and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant

herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Merchants Packing Company, a corporation, *Plaintiff and Appellant,* *vs.* Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and Guy T. Helvering, Commissioner of Internal Revenue, *Defendants and Appellees.*	In Equity.

APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

CLAUDE I. PARKER,
RALPH W. SMITH,
J. EVERETT BLUM,
Bank of America Bldg., 7th and Spring, L. A.,
Solicitors and Counsel for Plaintiff and Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Merchants Packing Company, a corporation, *Plaintiff and Appellant,* *vs.* Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and Guy T. Helvering, Commissioner of Internal Revenue, *Defendants and Appellees.*	In Equity.

APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

Comes now Merchants Packing Company, a corporation, appellant herein, and respectfully states to the Court that the said appellant on the 3rd day of July, 1935, brought a Bill in Equity in the United States District Court of the United States, Southern District of California, Central Division, entitled "Merchants Packing Company, a corporation, plaintiff, vs. Nat Rogan, Individually and as Collector of Internal Revenue for the

Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and Guy T. Helvering, Commissioner of Internal Revenue, defendants", and numbered 702-J, Equity, in the Central Division of said United States District Court, a copy of which said Bill of Complaint is hereto attached, marked Exhibit A, and by this reference hereby incorporated herein and made a part hereof as though fully stated and set forth.

That thereafter the appellant herein filed its amendment to complaint and second amendment to complaint pursuant to order of Court alllowing the filing thereof. That a copy of said Amendment to Complaint is hereto attached, marked Exhibit B, and by such reference hereby incorporated herein and made a part hereof as though fully stated and set forth. That a copy of said Second Amendment to Complaint is hereto attached, marked Exhibit C, and by such reference hereby incorporated herein and made a part hereof as though fully stated and set forth.

That in said Bill of Complaint and Amendments thereto, in said Cause No. 702-J, Equity, the appellant herein alleged that plaintiff and defendants are residents of the Southern District of California, Central Division; that the defendant is the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California; that plaintiff is engaged purely and solely in intrastate business; that plaintiff is a hog processor; that the action is brought to enjoin the collection of the processing tax levied under the Agricultural Adjustment Act of May 12, 1933, as amended; that said act sets forth that the declared policy of Congress in Section 2,

is to establish and maintain such balance between production and consumption of agricultural commodities as will give such commodities a purchasing power equal to the cost of the articles farmers must buy; to approach such equality of purchasing power gradually and to protect consumers' interest; that said Act further provides for levy, assessment and collection of a processing tax on the first domestic processing of commodities, including hogs, at a rate to be determined by the Secretary of Agriculture; that said Act provides that the Secretary of Agriculture shall have the power to enter into reduction of crops agreements with farmers; to provide for rental or benefit payments to farmers in connection therewith, in such amounts as the said Secretary deems fair; to put into effect the processing tax; to make regulations, and provides for a penalty for violation thereof; to make exemptions from or additions to the list of commodities set forth in the Act; said Act provides that the rate of said tax shall equal the difference between currrent average price for the commodity and the fair exchange value thereof, except under certain conditions, when the said Secretary shall prescribe some other rate; defines fair exchange value; provides for appropriation of the entire proceeds of the processing tax plus addditional sums to carry out the Act and make rental and benefit payments. Said Complaint further alleges that the said Secretary proclaimed that benefit payments were to be made with respect to hogs and put the processing tax into effect at certain rates which from time to time he increased; alleges the levy, assessment and collection of the processing tax against plaintiff and payment thereof for all months from inception to May, 1935; alleges penalties for nonpayment

of tax; alleges that said Act is void, invalid and unconstitutional upon the following grounds: (1) that said Act violates the 5th Amendment to the United States Constitution; (2) that said Act violates the 10th Amendment of the United States Constitution; (3) that said Act violates Article 1, Section 8, of the United States Consittution; (4) that said Act delegates legislative powers to the Secretary of Agriculture; (5) that said Act attempts to regulate intrastate business; (6) that said Act is not being administered in accordance with its terms by the Secretary of Agriculture; said Complaint further alleges the processing tax assessed or about to be assessed against plaintiff and the amounts thereof, the liability for payment thereof, the imposition of penalties in the event of nonpayment; the Complaint alleges plaintiff has no plain, speedy or adequate remedy at law, and the grounds therefor; alleges multiplicity of suits both as to refunds and for damages because of the trespasses committed or threatened to be committed against plaintiff by defendant; the destruction of plaintiff's property and property rights; the inability of defendants to answer to plaintiff for damages; that plaintiff is entitled to an injunction and a declaration as to the constitutionality of the said Act; that plaintiff has absorbed the said tax and not passed the said tax on; that plaintiff has sustained and is sustaining losses from its pork processing business solely because of said Act and the processing tax levied pursuant thereto; all of which is more fully set forth in plaintiff's complaint and amendments thereto, Exhibits A, B, and C, to which reference is hereby respectfully made.

A summons was duly issued in equity in said cause and served upon the defendants. That at the time of filing

said Complaint a Temporary Restraining Order was issued by the said District Court of the United States, copy of which is hereto attached, marked Exhibit D, and by such reference thereto is hereby incorporated herein and made a part hereof as though fully stated and set forth. That said Temporary Restraining Order was duly served upon said defendants. That thereafter the appellant herein caused to be served upon the defendants a notice that said appellant would apply to the Honorable William P. James, United States District Judge for the Southern District of California, Central Division, in the City of Los Angeles, on July 11, 1935, for Preliminary Injunction restraining the defendants from, (a) collecting or attempting to collect from plaintiff such or any processing tax, whether by distraint, levy, action at law or in equity; (b) imposing or giving notice of intention to impose or causing to be imposed or filed any lien upon the property of plaintiff, whether real or personal; or (c) in any other manner collecting or attempting to collect said tax.

That thereafter defendants served upon plaintiff a copy of motion to dismiss, copy of which is hereto attached, marked Exhibit E, and by such reference incorporated herein the same as though fully stated and set forth, together with objections to the granting of a preliminary injunction, copy of which is attached hereto, marked Exhibit F, and by such reference hereby incorporated herein as though fully stated and set forth, and caused the same to be filed in the cause.

That thereafter a hearing was duly had on the application to the Honorable William P. James, Judge of the said District Court, for a Preliminary Injunction, and the Honorable William P. James, upon hearing, denied

defendants' motion to dismiss, overruled their objections to the granting of a Preliminary Injunction, and did grant to plaintiff a Preliminary Injunction as prayed for. That a copy of said Preliminary Injunction is hereto attached, marked Exhibit G, and by such reference hereby incorporated herein and made a part hereof as though fully stated and set forth. That a copy of said Preliminary Injunction was duly served upon the defendants.

That thereafter the defendants served upon the plaintiff Notice of Motion to Vacate Temporary Injunction, together with Motion to Vacate Temporary Injunction, in said suit No. 702-J Equity, notifying the plaintiff that said defendants intended to move the above entitled Court, in in the Courtroom of the Honorable Paul J. McCormick, on the 27th day of August, 1935, at ten o'clock a. m. thereof, for an Order vacating and setting aside the Temporary Injunction heretofore entered on the grounds and for the reasons stated in said Motion. That a copy of said Notice of Motion to vacate Temporary Injunction and a copy of Motion to Vacate Temporary Injunction are attached hereto, marked Exhibit H and Exhibit I, respectively, and by such reference each is hereby incorporated herein and made a part hereof as though fully stated and set forth.

That thereafter, and on the 27th day of August, 1935, the defendants made their said Motion to Vacate Temporary Injunction and after hearing had thereon the Court, on the 30th day of August, 1935, made its Order in said Cause No. 702-J, Equity, granting defendants' Motion to Vacate Temporary Injunction, thereby vacating said preliminary injunction. That a copy of said Order, entitled "Minute Order on Motion to Vacate Temporary

Injunction", issued in said suit No. 702-J, Equity, is attached hereto, marked Exhibit J, and by such reference hereby incorporated herein and made a part hereof as though fully stated and set forth.

That since the filing of said Bill of Complaint in said suit No. 702-J, Equity, and the hearing on the application for preliminary injunction and the granting thereof as aforesaid, the Congress of the United States did enact an amendment to the Agricultural Adjustment Act, which said amendment is known as Senate Amendment No. 114, H. R. 8492, and is embodied in the amendments to the said Agricultural Adjustment Act enacted by Congress, and signed by the President of the United States on the 24th day of August, 1935, which said Amendment did substantially, effectively, and for all practical purposes and to all intents take away and deny plaintiff below, appellant herein, all remedy at law, for the reason that said amendment provides, among other things, that before any refund can or shall be made under said Act, of any tax paid thereunder, by reason of the invalidity of said Act the taxpayer must establish to the satisfaction of the Commissioner of Internal Revenue and the Commissioner of Internal Revenue shall find and declare of record, after due notice and hearing, that the claimant, taxpayer, absorbed the entire amount of said tax so paid and did not pass said tax or any part thereof, either directly or indirectly, to any person, firm, corporation or individual. That such fact is uncertain and indefinite or impossible of direct proof and is particularly rendered so in regard to appellant's business, to wit, pork packing, for the reason that the processing tax is levied upon the live hog at the rate of $2.25 per live cwt. That not more than 75 per cent

of live hog is usable in the pork packing business; that such 75 per cent of the live hog is divided into numerous different food products, including such food products as hams, sausage, bacon, lard, roasts, chops, hocks, feet, heads, shoulders, trimmings, casings, etc.; some of which products are pickled, others smoked, and others go through sundry other processes and some are sold fresh. That to allocate the proportional part of tax to each such article would be uncertain, indefinite or impossible, because it would be practically impossible or impossible to follow the different portions of each dressed hog and show the price thereof and the amount received by plaintiff upon the sale thereof because said dressed hogs are cut into the said above named portions and stored and kept until sale thereof is available, and different portions are necessarily marketed at different times at greatly varying prices and, therefore, tracing the relation of the price for each hog, including the processing tax, and the aggregate price obtained upon the sale of all said portions at such different times in varying market or sale prices so as to prove the absorption or non-absorption of the said processing tax by plaintiff would be most uncertain, inadequate, ineffective or impossible. That plaintiff knows that said processing tax can not be passed on. That even assuming that such allocation of the processing tax could be made for the purpose of proving the absorption of said tax, there would be required by plaintiff such an extensive and expensive bookkeeping system that the attendant employment of additional employees would create a much further and greater loss than plaintiff is now incurring. That by reason thereof should the appellant herein be relegated to his action at law for a refund after paying the tax it

would result in denying appellant herein any relief at law whatsoever, although it would in fact be entitled to such refund.

That appellant did, on the 12th day of September, 1935, file herein, after Order of Court allowing the same, its Supplemental Complaint, alleging the aforesaid facts. That a copy of said Supplemental Complaint is attached hereto, marked Exhibit K, and by such reference hereby incorporated herein and made a part hereof as though fully stated and set forth. That in said Supplemental Complaint plaintiff alleged that said Agricultural Adjustment Act had been amended and in particular, Section 21 thereof, and that by such amendment any and all remedy at law which plaintiff may or might theretofore have had has, for all practical purposes, been taken away and that by reason of such amendment plaintiff has no plain, adequate, speedy, full and complete remedy at law, for the reasons therein stated, all of which is more fully set forth in said Supplemental Complaint, marked Exhibit K, to which reference is hereby respectfully made.

That appellant duly excepted to said Order vacating preliminary injunction.

That on the 13th day of September, 1935, the appellant herein filed its petition for an appeal, which was duly allowed by the Honorable Paul J. McCormick, United States District Judge, who heard defendants' Motion to Vacate Preliminary Injunction, and filed at the same time its Assignment of Errrors, and a citation was issued and a cost bond duly filed and approved by the Honorable Paul J. McCormick, praecipe filed and notice of such filing duly made upon appellees.

That appellant has, therefore, perfected its appeal to the Circuit Court of Appeals for the Ninth Circuit, making said cause returnable at San Francisco, California, as provided by law.

This appellant has duly caused to be prepared a transcript of record in said cause and will file the same in accordance with law, within the time allowed by law, in the Clerk's Office of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California. In the meantime, pending the hearing of the appeal on its merits, this appellant alleges that for the reasons set forth in its Bill of Complaint and Amendments thereto, in said cause No. 702-J, Equity, in the United States District Court, in and for the Southern District of California, Central Division, and because the Judge of said Court did vacate plaintiff's preliminary injunction, the appellees herein will, unless restrained by preliminary injunction granted by this Court, to the irreparable damage and loss of the appellant herein, proceed with the collection of said tax and will file or cause to be filed and imposed liens against plaintiff's property, and have threatened to and will distrain and seize plaintiff's property and sell the same for the collection of said tax, and will render plaintiff's property and property rights wholly valueless and worthless and will commit continuous trespasses and breaches of the peace against appellant and appellant's property, leaving appellant wholly unable to recoup its losses and damages for the reason that appellees are wholly unable to answer to appellant in an action for damages by reason of the commission of said acts, for the reason that appellees do not have the financial ability to answer to such judgment. The appellant alleges that it has no complete, plain, speedy, adequate

and full remedy at law and that the preliminary injunction should be granted herein as prayed for in its bill of complaint, which appears in the record of this cause. The appellant alleges that it is ready and willing to give any reasonable bond that may be required by an Order of this Court, and thereupon prays that this Court make an Order granting the preliminary injunction upon such terms and conditions as to this Court may seem just and equitable in the premises and that the order of the Honorable Paul J. McCormick, District Judge, vacating the appellant's preliminary injunction, be set aside and that the preliminary injunction be granted as prayed.

CLAUDE I. PARKER,
RALPH W. SMITH,
J. EVERETT BLUM,
Solicitors and Counsel for
Plaintiff and Appellant.

[Exhibit A.]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MERCHANTS PACKING CO., a corporation, Plaintiff, vs. NAT ROGAN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, E. H. COHEE, INDIVIDUALLY AND AS ACTING COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, and GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Defendants.	In Equity No. 702 J BILL OF COMPLAINT IN INJUNCTION

Comes now the plaintiff and complains of the defendants and alleges:

I.

That plaintiff now is and has been at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with

its principal place of business located in Los Angeles, California, and is a resident of the Southern Ditsrict of California, Central Division.

II.

That the defendant, NAT ROGAN, is the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, E. H. COHEE, is the duly designated acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, GUY T. HELVERING, is the duly appointed, qualified and acting Commissioner of Internal Revenue and a resident of Washington, D. C.

III.

That plaintiff is engaged in the business of buying, at its plant in Los Angeles, California, hogs, cattle and other live stock, slaughtering the same and converting and packing same into food products and selling said food products so converted and packed in its trade territory, which trade territory is wholly within the State of California. That all of its purchases, all of its sales, and all of its business is transacted within the State of California and that it is not engaged in any interstate commerce or business either directly or indirectly nor does any of plaintiff's business affect interstate commerce either directly or indirectly.

IV.

That this is an action brought to enjoin the assessment of certain so-called processing taxes about to be assessed against the plaintiff by the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, and the collection of said taxes after assessment, all as provided in that certain act known as the Agricultural Adjustment Act of May 12, 1933, adopted by the Congress of the United States, all as more particularly hereinafter alleged.

V.

That on or about the 12th day of May, 1933, the Congress of the United States adopted an act known as the Agricultural Adjustment Act of May 12, 1933, and that said act was thereafter amended on April 7, 1934, May 9, 1934, June 19, 1934, and June 26, 1934, said act being Title 1, Chapter 25, Act of May 12, 1933; U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive.

VI.

That under and by virtue of the terms of said Agricultural Adjustment Act the declared policy of Congress as shown by Section 2 thereof is as follows:

"1. To establish and maintain a balance between the production and consumption of agricultural commodities and such marketing conditions therefor as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farms buy equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the pre-war period of August, 1909-July, 1914. * * *

2. To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumption demands in domestic and foreign markets.

3. To protect the consumer's interest by readjusting farm production at such level as will not increase the percentage of the consumer's retail expenditures for agricultural commodities or products derived therefrom which is returned to the farmer above the percentage which was returned to the farmer in the pre-war period, August, 1919-July, 1914."

VII.

That said Agricultural Adjustment Act further provides that processing taxes are to be levied, assessed, and collected on the first domestic processing of the commodity and are required to be paid by the processor. That the plaintiff is a processor of hogs and as hereinafter alleged has been required to pay a monthly processing tax fixed by the Secretary of Agriculture with respect to hogs slaughtered by it, and is now threatened with the payment of additional monthly processing taxes so fixed by the Secretary of Agriculture with respect to hogs slaughtered by it.

VIII.

That under and by virtue of the terms of said Agricultural Adjustment Act and the amendments thereto power is attempted to be conferred upon the Secretary of Agriculture—

(a) To agree with producers upon reduction in acreage or reduction in production of any basic agricultural commodity.

(b) To provide rental or benefit payments in connection therewith "in such amounts as the Secretary deems fair and reasonable".

(c) To enter into marketing agreements with processors, association of producers, and others.

(d) To put into effect processing taxes at rates determined and altered by him from time to time but only when the Secretary has first made a determination that rental or benefit payments are to be made with respect to any basic agricultural commodity.

(e) To make regulations to carry out his powers and a penalty for the violation of such regulations is prescribed in the sum of not over $100.00.

(f) To make exemptions from processing taxes when, in the Secretary's judgment, processing taxes are unnecessary to effectuate the declared policy of the Act.

(g) To add to the list of basic agricultural commodities provided in said Act such additional agricultural commodities as the Secretary may determine to be in competition with the commodities set forth in said Act at such time or times as the said Secretary shall determine that the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof.

IX.

That said Agricultural Adjustment Act further provides that in determining the amount of processing tax

to be assessed against any such processor the tax shall be at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that (1) if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks in the commodity products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties and if thereupon the Secretary finds that any such result will occur, then the processing tax or the processing of the commodity generally or for any designated use or uses or as to any designated product or products thereof for any designated use or uses shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. * * *"

"(c) For the purposes of Part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power with respect to articles farmers buy as such commodity had during the base period specified in Section 2 (August, 1909-July, 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Said Agricultural Adjustment Act further provides, in Section 12 (b), that in addition to the specific sums ap-

propriated by Congress to carry out said act that the proceeds derived from the taxes imposed under said Act are thereby appropriated to be available to the Secretary of Agriculture "for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: administrative expenses, rental and benefit payments and refunds on taxes".

That said Act further provides that among other things hogs are a basic agricultural commodity.

X.

That acting under said Agricultural Adjustment Act the Secretary of Agriculture has made the following determinations and entered the following orders fixing the amount of processing taxes, to wit:

(a) As of August 17, 1933 he proclaimed that benefit payments were to be made with respect to hogs, as basic agricultural commodity.

(b) That he determined from statistics of the Department of Agriculture that the difference between the current average farm price of hogs for the base period, August, 1909-July, 1914, and the fair exchange value of hogs as of November 5, 1933 was $4.21 per hundred pounds live weight.

(c) That he held a hearing in Washington on September 5, 1933 and after said hearing determined that the imposition of a processing tax of $4.21 per hundred pounds live weight would result in an accumulation of surplus stocks of hogs or the products thereof or the depression of the farm price of hogs, and determined that the following rates of processing tax would prevent such results: 50 cents per hundred pounds live weight effec-

tive as of November 6, 1933; $1.00 per hundred pounds live weight effective as of December 1, 1933; $1.50 per hundred pounds live weight effective as of January 1, 1934; $2.00 per hundred pounds live weight effective as of February 1, 1934. That thereafter and with the approval of the President, the said Secretary of Agriculture made a determination as of December 21, 1933 wherein and whereby the rate of the processing tax on the first domestic processing of hogs as of January 1, 1934 shall be $1.00 per hundred pounds live weight; as of February 1, 1934, $1.50 per hundred pounds live weight; as of March 1, 1934 $2.25 per hundred pounds live weight, which said rate of $2.25 per hundred pounds live weight is now and ever since the said March 1, 1934 has been in full force and effect.

XI.

That there has been levied and assessed against the plaintiff herein as a first domestic processor of hogs, under the terms of said Agricultural Adjustment Act and the administrative orders of the Secretary of Agriculture on all hogs slaughtered by plaintiff, and that plaintiff has paid on account of such processing tax to the Collector of Internal Revenue for the Sixth Internal Revenue District of California the total sum of $81,803.96 on account of hogs processed and slaughtered by it. That so long as said Agricultural Adjustment Act is enforced there will be levied and assessed against the plaintiff processing taxes based upon its average monthly slaughter of hogs, if the tax is continued, at the rate of $2.25 per hundred pounds live weight of the approximate average monthly amount of $5,000.00. That the failure of the plaintiff to pay said processing taxes as and when due

will result in the imposition of the following penalties against it:

(a) A penalty of interest at the rate of one per cent (1%) per month from the due date of each monthly installment of said tax.

(b) A penalty of five per cent (5%) of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the Collector of Internal Revenue, said penalty being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent (1%) per month.

(c) After a second ten-day notice, the Government is authorized under the provisions of the applicable law, if the tax is not paid, to file liens against any and all of plaintiff's property and to distrain the plaintiff's property, including its plant, inventory, cash on hand, and other assets, for the purpose of realizing the amount of the tax and penalties.

XII.

That the said Agricultural Adjustment Act, in so far as it authorizes the imposition, levy, assessment and collection of processing taxes against the plaintiff, is void, invalid and beyond the powers granted to Congress by the Constitution of the United States and violates the provisions of the Constitution of the United States in the following parts:

1st: The Agricultural Adjustment Act violates the Fifth Amendment to the Constitution of the United States in that it takes the plaintiff's property without due process of law, for the reason that the processing tax goes into effect only when and in the event that the Secretary of

Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity and ceases at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. That the so-called processing tax is therefore not a tax at all but is in effect the taking of property of the plaintiff and other processors for the benefit of another class of citizens.

2nd: That the said Agricultural Adjustment Act violates the Tenth Amendment of the Constitution of the United States in that it is not adopted in pursuance of any power expressly or directly granted to the Congress by the Constitution of the United States and that the matters in said Act attempted to be regulated are not matters which come within the purview of any power so delegated to Congress by the Constitution of the United States and is therefore reserved to the States respectively or to the people. That the declared policy of the Act shows that the matters therein attempted to be regulated and the results to be obtained are matters which are within the exclusive jurisdiction of the States or the people and not within the jurisdiction of the Congress of the United States.

3rd: That the Agricultural Adjustment Act violates Article 1, Section 8, of the Constitution of the United States in that it is not a tax or a duty or an imposition or an excise as therein contemplated, for the reason that the so-called processing tax is not a tax for the benefit of the Government but is an arbitrary exaction from plaintiff and other processors for the benefit of certain farmers and producers and is to be assessed and collected only

where it is found and determined by the Secretary of Agriculture that a necessity exists for the payment of rental or other benefits to such farmers or producers.

4th: That the powers attempted to be granted by the Congress of the United States to the Secretary of Agriculture by the said Agriculture Adjustment Act are legislative functions to be exercised by the Congress of the United States alone. That such legislative functions and power can not be delegated by the Congress to the Secretary of Agriculture or any one else. That specificallly said Agricultural Adjustment Act attempts to delegate to the Secretary of Agriculture the power to determine and fix the rate of the processing tax and the necessity therefor when such processing tax shall cease to be levied and collected, what agricultural commodities shall be subject to the tax and who shall pay the same. That there is no formula or standard set up by the Congress according to which the Secretary of Agriculture shall act for the reason that the formula or standard therein attempted to be prescribed is uncertain, indefinate, and the factors upon which such determination are to be based are variable and impossible of exact or definite ascertainment. That the method of computation of said tax is indefinite and vague and the amount of the tax provided for is incapable of specific determination under the terms of said act; that there is no definition of the essential terms the determination of which the Secretary of Agriculture is to make in calling the said processing tax into being and fixing the rate thereof and for the further reason

that the attempted standard or formula, that is to say, that level which equals the difference between the current average farm price for the commodity and the fair exchange of value of the commodity, is destroyed by the exception that follows such formula or standard as provided in Section 9 (b) of said Act.

5th: That by the terms of said Agricultural Adjustment Act said Act is only to affect persons engaged in interstate commerce or whose business affects interstate commerce directly or indirectly and that plaintiff is not one of the persons therein contemplated to be liable for the processing tax, for the reason as aforesaid that plaintiff's business is entirely intra-state and none of it is interstate. That Congress has no power or authority to regulate intra-state business.

6th: That the said Agricultural Adjustment Act is not being carried out as provided in its terms as said Secretary of Agriculture should carry it out, for the reason that the rate fixed by said Secretary of Agriculture for the months of January, February, March, April, and May, 1935, at the rate of $2.25 per hundred pounds live weight for hogs is invalid and void for the reason that said rate has been fixed and established by the Secretary of Agriculture in complete disregard to the so-called formula prescribed by said Agriculture Adjustment Act for the establishing of such rate. As calculated and determined from the statistics of the Department of Agriculture the fair exchange value of pre-war parity farm price for hogs, the actual farm price for hogs, and the

excess of pre-war parity over the actual price for hogs for said months hereinabove enumerated are as follows:

1935	Fair exchange value or pre-war parity farm price for hogs.	Actual farm price for hogs.	Excess of pre-war parity of farm over actual prices.
Jan.	$9.10	$6.87	$2.23
Feb.	9.17	7.10	2.07
Mar.	9.24	8.10	1.14
Apr.	9.24	7.88	1.36
May	9.24	7.92	1.32

That the above set out figures show that there is no basis on which a processing tax at the rate of $2.25 per hundred pounds live weight of hogs can be levied or collected. That the action of the Secretary of Agriculture in establishing the rate of $2.25 per hundred pounds live weight is without foundation and against fact and is not justified by the Act even if it were valid. That said action of the Secretary of Agriculture will be continued in the future and that plaintiff will be required to pay large sums of money as processing taxes which are wholly unnecessary, in order to bring the purchasing power with respect to articles which farmers buy to the level of such purchasing power in the base period. That the action of the Secretary of Agriculture in this respect is unwarranted, arbitrary and contrary to the so-called formula or standard set out by said Act and adopted by the Secretary of Agriculture for the levying of such processing taxes on hogs.

XIII.

That there is about to be assessed against plaintiff herein a processing tax in the sum of $2,934.16 for the month of May, 1935, and a sum of money at this time

not known to plaintiff for the month of June, 1935, and for all of the months subsequent thereto during which time the Agricultural Adjustment Act shall remain in force. That upon the assessment thereof plaintiff will become liable for the payment thereof and will be forced to pay the same to the defendant, E. H. COHEE, as acting Collector of Internal Revenue for the Sixth District of California, and to NAT ROGAN, as Collector of Internal Revenue for the Sixth District of California, or to either of them. That unless the de-defendant, GUY T. HEVERING, as Commissioner of Internal Revenue, is enjoined from the assessing of said taxes about to be assessed or hereafter to be assessed, and unless the defendant, E. H. Cohee, individually and as acting Collector of Internal Revenue for the Sixth District of California, and Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, is enjoined from collecting such taxes, plaintiff will have to pay the same and in the event of nonpayment, be subject to the penalties hereinabove set forth.

XIV.

That plaintiff seeks the relief herein prayed for in equity for the reason that plaintiff has no speedy or adequate remedy at law for the reason that plaintiff can not file a claim for refund after payment of taxes and in the event of the rejection thereof file suit for the return of such taxes, for the reason that a judgment obtained thereon would be of no force or effect because the Congress of the United States has made no appropriation for the payment of any such funds. That although the Act as it now stands provides that refund shall be paid out of

the taxes as collected, plaintiff is informed and believes and therefore alleges that the amounts expended by the Secretary of Agriculture far exceeds the amounts appropriated by the Congress for the carrying out of said Act and the amount of taxes collected by reason of said processing taxes, so that the said Secretary of Agriculture or the Treasurer of the United States have no funds out of which to pay such refunds in the event plaintiff should obtain a judgment for the refund of the taxes paid.

That further plaintiff is informed and believes and therefore alleges that there is now pending in the Congress of the United States an act to amend the Agricultural Adjustment Act wherein it will be provided that no claim for refund shall be filed for any of the processing taxes theretofore paid nor shall any suit be maintained for the return or refund of any such taxes theretofore paid.

That plaintiff is informed and believes and therefore alleges that should he pay said tax at this time there would be no remedy at law available for him and therefore no adequate remedy at law to obtain the return or refund of said taxes theretofore paid. That plaintiff is further informed and believes and therefore alleges that the defendants and none of them could respond to a judgment obtained by plaintiff against them for the wrongful collection of the taxes herein sought to be enjoined, in the event this Act would thereafter be declared unconstitutional or void.

That plaintiff is informed and believes and therefore alleges that unless the defendants are restrained from the assessment and collection of the taxes herein set forth the said defendants will file or cause to be filed liens

against the property of plaintiff which will, in the very nature of said liens be a restraint upon plaintiff's right to deal in and with its property as freely as it could have dealt therewith before the filing of any such liens and will wholly destroy the value of plaintiff's property and plaintiff's business. That said liens will attach to the inventory of plaintiff so that plaintiff from the date of the filing of said lien will be unable to sell any of its inventory, including its hogs, and by-products thereof and food products made therefrom. That plaintiff is further informed and believes and therefore allleges that unless the defendants are restrained from the collection of said taxes said defendants will have the right to and will attempt to collect said taxes by distraint and by seizing the property of plaintiff. That the filing of any such liens or the distraint and seizure of plaintiff's property will involve repeated and continuous acts of trespass upon the property of said plaintiff by said defendants and defendants will employ numerous agents and servants to perform said acts of trespass. That as a result of any such distraint and seizure of the property of plaintiff herein there will be repeated breaches of peace if defendants are permitted the right to collect such taxes by such methods or any or either of them. That the defendants nor any of them have a financial responsibility near equal to the value of plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by the defendants, and if the defendants are permitted to continue and not be restrained from continuing their attempt

to collect said taxes plaintiff will suffer irreparable damage and the defendants will be unable to respond to plaintiff in damages. That plaintiff will have no way nor manner within which to recoup its losses or damages. That unless the said defendants are restrained as herein prayed for there will be a multplicity of suits all of which can be avoided by the granting by this Court of an injunction enjoining the defendants or any or either of them or their servants or agents from doing or attempting to do any of the acts herein sought to be enjoined.

XV.

That no issue of fact will or can be tendered by defendants. That it affirmatively appears from the said Agricultural Adjustment Act of May 12, 1933 that said Act is unconstitutional and void and that the plaintiff herein is therefore not liable for the payment of any of the said taxes herein sought to be enjoined.

WHEREFORE, plaintiff prays that the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, be enjoined and restrained from assessing any processing taxes against this plaintiff and that the defendants E. H. COHEE, individually and as acting Collector of Internal Revenue for the Sixth District of California, and NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, be enjoined and restrained from collecting or attempting to collect any of the said processing taxes, whether by distraint, levy, action at law or in equity or otherwise, and

that the said defendants be restrained from filing a lien against plaintiff's property by reason of said taxes and that the said defendants be restrained from distraining or seizing plaintiff's property in an attempt to enforce the payment of said taxes. That the defendants be enjoined and restrained from possessing themselves of plaintiff's property or any of it. That this Honorable Court issue its preliminary injunction upon the filing of plaintiff's complaint herein and that a time be set for the hearing thereon and that at such trial said preliminary injunction be made permanent, forever enjoining and restraining said defendants, their officers, servants, agents, solicitors, attorneys ,or succcessors in office, or any or either of them, from assessing the said tax herein complained of or from collecting or attempting to collect said taxes or any part thereof or from filing any liens against plaintiff's property by reason thereof or from distraining and seizing plaintiff's property, or in any way disturbing the quiet and peaceful possession of plaintiff in the free use of its property. That an Order to Show Cause be made herein and served upon the said defendants, requiring them to show cause at a date certain why they should not be permanently restrained and enjoined from committing the acts, or any of them, herein complained of, and that a subpoena be directed to said defendants to answer the premises and to stand to and abide by such order and decree.

That this Honorable Court do render its declaratory judgment herein, declaring the said Agricultural Adjust-

ment Act of May 12, 1933 unconstitutional and void for the reasons stated in plaintiff's complaint herein, and that the said Court further declare that the administration of said Act by the Secretary of Agriculture is illegal, invalid and void for the reason that said Act is not being administered according to its terms and conditions as set forth in plaintiff's complaint, and for such other and further relief as to this Court may seem just and equitable in the premises.

CLAUDE I. PARKER AND
RALPH W. SMITH,

By Ralph W. Smith
Attorneys for Plaintiff.

[Verified.]

[Endorsed]: Filed Jul 3 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Exhibit B.]

[Title of Court and Cause]:

AMENDMENT TO COMPLAINT

Comes now the plaintiff and files herein amendments to its complaint as follows, to wit:

I.

That there be added to said complaint a paragraph numbered XVI as follows:

"XVI.

The amount in controversy involved herein is in excess of $3,000.00. That there is a diversity of citizenship in that the plaintiff is a resident and citizen of the State of California and one of the defendants, Guy T. Helvering, Commissioner of Internal Revenue, is a resident and citizen of Washington, D. C."

II.

That said complaint be deemed to be amended so as the title of said complaint will read "Bill of Complaint in Injunction and for Declaratory Judgment."

CLAUDE I. PARKER AND
RALPH W. SMITH,

By J. EVERETT BLUM (signed)
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Amdt to Compl this 10 day of July 1935 Peirson M. Hall Attorney for.....

Filed Jul 11 1935 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk.

[Exhibit C.]

[Title of Court and Cause.]

SECOND AMENDMENT TO COMPLAINT.

Leave of Court first being had and obtained plaintiff herin files this the second Amendment to its complaint and amends its complaint by adding thereto the following paragraph to be known as paragraph "XVIII".

XVIII.

That the plaintiff herein has continuously, during the past several years, operated, maintained and conducted its business in a business-like, workmanlike and efficient manner and that plaintiff has, during the times herein mentioned, continued to so conduct, operate and maintain its business. That prior to the time that said processing tax was levied against plaintiff, plaintiff continuously showed a profit from its pork and packing business. That since the assessing and levying of said processing tax against the plaintiff plaintiff's profit from said pork packing business has been diminishing until at the time of filing plaintiff's complaint herein and for some time prior thereto plaintiff actually showed a loss from the operation of said pork packing business. That said diminishing returns and the loss from said pork packing business is directly, solely and only attributable to the assessment, levy and collection of said processing tax. That plaintiff has been unable to pass said tax on to the retailer or to the consumers of pork and has had to absorb the same and bear the loss therefrom. That plaintiff's profit in the pork business depends upon volume and that plaintiff has no control of and can not control the consumer market nor the con-

sumer resistance to prices. That plaintiff's overhead and the slaughtering and processing of hogs and pork is substantially a fixed overhead expense. That upon a reduction in the valume of hogs slaughtered there is not a corresponding reduction of operating expense, but that upon a reduction of hogs slaughtered there is a reduction in volume of pork sold and, consequently, a reduction in receipts therefrom. That solely by reason of said processing tax and not otherwise plaintiff has been forced to reduce the number of hogs slaughtered by reason of the Agricultural Adjustment Act affecting the price market of such hogs and the consequent reduction of retail sales and the consequent reduction of sales by plaintiff to retailers. That such reduction in sales by plaintiff has reduced the volume of sales to such extent that plaintiff for many months prior to the filing of its complaint herein has been operating its pork packing business at a loss, as aforesaid.

That plaintiff can not control the cost of the hogs which it is forced to purchase in the operating of its pork packing business. That said price of hogs being such that plaintiff can not control the same has materially increased plaintiff's cost of operation and consequently, plaintiff's prices to its retailers have had to be increased in accordance therewith, thereby resulting in a reduced consumer market. That since, as aforesaid, plaintiff must and does depend upon volume for its profit the reduction of volume of sales results in a reduction of profit to plaintiff. That said volume has been so reduced that plaintiff is now oper-

ating at a loss and consequently, by reason of said consumer market resistance plaintiff has been unable to pass said tax on to its retailers or to the consumers. That plaintiff's losses are attributable solely and only to said Agricultural Adjustment Act and the processing tax levied thereunder and not in any manner to the manner in which plaintiff conducts, operates and maintains its business.

WHEREFORE, plaintiff prays for the relief prayed for in its complaint.

Claude I. Parker
Ralph W. Smith
J. Everett Blum
Attorneys for Plaintiff.

[Verified.]

[Endorsed]: Filed Sep 6 - 1935 R. S. Zimmerman, Clerk By Robert P Simpson Deputy Clerk.

[Exhibit D.]

[Title of Court and Cause.]

TEMPORARY RESTRAINING ORDER.

WHEREAS, in the above entitled cause the verified Bill of Complaint for preliminary injunction has been filed; and

WHEREAS, it appears from said bill that there is danger of immediate and irreparable injury, loss or damage being caused to the plaintiff before notice can be served and a hearing had thereon unless the above named defendants are and each of them is, pending such hearing, restrained as herein set forth for the reason that plaintiff is required to pay on June 30, 1935, the amount of tax set forth in said bill. That if said tax is not then paid the defendants threaten to levy and distrain upon the property of the plaintiff and file liens against the property of plaintiff and that plaintiff has no option of paying the tax and sueing to recover it back because, as alleged in said bill, it is now threatened with the deprivation of its right to institute said suit;

NOW, THEREFORE, take notice that you, GUY T. HELVERING, are hereby temporarily restrained and enjoined from assessing or attempting to assess against the plaintiff such or any processing tax, and

That you, E. H. COHEE and NAT ROGAN, and your respective agents, servants, attorneys, solicitors and officers are hereby temporarily restrained and enjoined:

(a) From collecting or attempting to collect from plaintiff such or any processing tax, whether by distraint, levy, action at law or in equity;

(b) Imposing or giving notice of intention to impose or causing to be imposed or filed any lien upon the property of plaintiff, whether real or personal; or

(c) In any other manner collecting or attempting to collect said tax, as prayed for in the Bill of Complaint.

And IT IS FURTHER ORDERED that this cause be set down for hearing upon the application for temporary injunction and pursuant to the Order to Show Cause this day granted, on the 11th day of July, 1935, at ten o'clock a. m., and the defendants above named are hereby notified of said hearing and this temporary restraining order shall remain in full force and effect until said hearing and until the further order of this Court.

Wm. P. James
JUDGE OF THE ABOVE ENTITLED COURT.

[Endorsed]: Filed Jul 3 1935 R. S. Zimmerman, Cerk. By L. Wayne Thomas Deputy Clerk.

[Exhibit E.]

[Title of Court and Cause.]

MOTION TO DISMISS

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and move the court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I

That the court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complainant has a plain, adequate and complete remedy in the ordinary course at law.

II

That the United States of America is a real party in interest and it may not be sued without its consent.

III

That there is no actual controversy between complainant and these defendants, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V

That the proceeding attempted to be instituted by this Complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney,

Attorneys for Defendants
NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within motion to dismiss this 10 day of July 1935. Claude I. Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas Deputy Clerk.

[Exhibit F.]

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, allege:

I

That the defendants are, and each of them is, a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II

That the duties of said defendants are to collect taxes levied under the Internal Revenue Laws of the United States.

III

That the complaint in the above-entitled case seeks to enjoin defendants from collecting taxes levied under and by the Internal Revenue laws of the United States.

IV

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax.

V

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

Dated: This 10 day of July, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney,

Attorneys for defendants
NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within Objections to the Granting of a Preliminary Injunction this 10 day of July 1935, Claude I Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

[Exhibit G.]

[Title of Court and Cause.]

PRELIMINARY INJUNCTION.

WHEREAS, in the above entitled cause and the verified Bill of Complaint for preliminary injunction and declaratory relief has been filed; and

WHEREAS, the temporary restraining order has been granted; and

WHEREAS, the defendants Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, have appeared and filed their motion to dismiss the bill of complaint filed herein; and

WHEREAS, the matter came on regularly for hearing on said application for preliminary injunction and motion to dismiss on the 11th day of July, 1935, at the hour of ten o'clock a. m. thereof before the above entitled Court, in the courtroom of Judge William P. James; and

WHEREAS, said matter having been argued fully by the plaintiffs through their attorneys, Claude I. Parker and Ralph W. Smith, by J. Everett Blum, and by the appearing defendants through their attorneys, Pierson M. Hall, United States Attorney, and Clyde Thomas, Assistant United States Attorney; and

WHEREAS, it appears from said bill of complaint and from the argument had on said application for preliminary injunction and said motion to dismiss that unless a preliminary injunction is granted herein that immediate and irreparable injury, loss, or damage will be caused to plain-

tiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be destroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants; and

WHEREAS, the Court has been fully advised and points and authorities submitted on behalf of both parties hereto and the matter having been submitted to the Court for its decision;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the application for the preliminary injunction prayed for is hereby granted and the motion of the appearing defendants to dismiss is denied.

IT IS FURTHER ORDERED that said preliminary injunction issue and that said appearing defendants, Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, and E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and their respective agents, servants, attorneys, solicitors and officers, are and each of them hereby is restrained and enjoined from:

(a) Collecting or attempting to collect from plaintiff such or any processing tax, whether by distraint, levy, action at law or in equity;

(b) Imposing or giving notice of intention to impose or causing to be imposed or filed any lien upon the property of plaintiff, whether real or personal; or

(c) In any other manner collecting or attempting to collect said tax.

That this preliminary injunction is based upon the grounds that unless the same is granted that immediate and irreparable injury, loss, or damage will be caused to plaintiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be destroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff is to furnish security in this case as a condition to the issuance of the injunction in the sum of $10,000.00 cash or in lieu thereof an undertaking by good and sufficient surety in the sum of $10,000.00, conditioned upon the payment of all taxes chargeable against the plaintiff herein, together with all costs assessed by the Court, in the event it is finally decided that the injunction is improperly issued or this action is dismissed.

It is further ORDERED, ADJUDGED AND DECREED that the plaintiff continue to file its processing tax returns on the forms provided therefor by the Col-

lector of Internal Revenue with the defendant Collector of Internal Revenue on all hogs processed.

It is further ORDERED, ADJUDGED AND DECREED that the Court reserves the right to require additional security to be given from time to time as may seem necessary to protect the defendants and the Court also reserves the right to modify this order in any part or particular after notice to the parties.

It is further ORDERED, ADJUDGED AND DECREED that this preliminary injunction remain in force until the final determination of this matter or until further order of the Court.

It is further ORDERED that the defendants shall be and hereby are allowed fifteen (15) days after notice hereof within which to answer the bill of complaint.

It is further ORDERED that an exception is allowed to the defendants with respect to this order.

Dated this 9th day of August, 1935.

Paul J. McCormick
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM;

CLAUDE I. PARKER AND RALPH W. SMITH,
By J Everett Blum
Attorneys for Plaintiff.

Pierson Hall
PIERSON M. HALL, United States Attorney.

Clyde Thomas
CLYDE THOMAS, Assistant United States Attorney.
Attorneys for Appearing Defendants.

[Endorsed]: Filed Aug 9—1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

[Exhibit H.]

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE TEMPORARY INJUNCTION

TO MERCHANTS PACKING COMPANY, a corporation, plaintiff in the above entitled action, and

TO CLAUDE I. PARKER and RALPH W. SMITH, its attorneys:

You, and each of you, will please take notice that the defendants above named will move the above entitled court, in the courtroom of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, on the 27th day of August, 1935, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the temporary injunction heretofore entered, on the grounds and for the reasons stated in said motion, copy of which is hereunto attached.

Dated: This 22 day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney.

[Acknowledgment]: Claude I. Parker Ralph W Smith By J. Everett Blum Attys for Pltf.

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman, Clerk. By B. B Hansen Deputy Clerk.

[Exhibit I.]

[Title of Court and Cause]:

MOTION TO VACATE TEMPORARY INJUNCTION

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court, to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 9th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Compaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled, "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved ..... which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of $1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plain-

tiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's bill of complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22nd day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas
CLYDE THOMAS,
Assistant U. S. Attorney
Attorney for Defendant.

[Acknowledgment]: Claude I. Parker. Ralph W. Smith By J. Everett Blum Attys for Pltf.

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

[Exhibit J.]

IN THE DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Honorable PAUL J. McCORMICK, Judge

MERCHANTS PACKING CO., a corporation, Plaintiff, vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, etc., et. al., Defendants.	IN EQUITY No. 702-J Minute Order on Motion to Vacate Temporary Injunction August 30, 1935

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the regular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted. The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

[Exhibit K]

[Title of Court and Cause]:

SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, MERCHANTS PACKING COMPANY, a corporation, and leave of Court having been granted to file this its Supplemental Complaint, states and alleges:

I.

That the Senate and the House of Representatives of the Congress of the United States has passed certain amendments to the Agricultural Adjustment Act known as H. R. 8492 and that the President of the United States has signed said enactment and that the said Agricultural Adjustment Act is thereby amended as hereinafter in part stated.

That said act provides in Section 21 (d) (1) of said Amendment that no recovery, recoupment, refund, etc., shall be made or allowed to any taxpayer unless after a claim for refund has been duly filed it shall be established in addition to all other facts required to be established to the satisfaction of the Commissioner of Internal Revenue and the Commissioner shall find and declare of record, after due notice and hearing thereon, that the taxpayer, directly or indirectly, has not passed said tax or any part thereof on to the retailer or consumer or back to the producer, but has in fact absorbed and borne the whole of said tax, before the Commissioner shall allow any such claim for refund. That if said Commissioner

shall reject said claim the record of the Commissioner shall be certified by him to the Court in which the taxpayer brings action upon his rejected claim for refund and such record so certified shall become and be the evidence of taxpayer's case before such Court.

Section 21 (d) (2) of said Amendment provides in part in substance, that no suit or action shall be maintained for recovery of refund, etc., unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally declared invalid, a claim for refund is filed by the person entitled thereto, and that no suit or proceedings shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time.

That the said provisions of the law as it now stands substantially effectively, and for all practical purposes and to all intents, take away from and deny plaintiff any and all remedy at law, for the reason that plaintiff is required at the outset to prove a negative in that plaintiff must prove that said tax has not been passed on or back as in said Section 21 (d) (1) provided. That such proof is not capable of being made to a certainty nor with definiteness, and particularly is such proof uncertain and indefinite in regard to plaintiff's business, to wit, pork processing, for the reason that the processing tax is levied upon the live weight of the hog at the rate of $2.25 per cwt.; that not more than 75 per cent of said live hog is usable in the prok processing business, and that said 75 per cent of the live weight of the hog is divided into numerous portions in-

cluding ham, sausage, bacon, lard, loin, hocks, feet, heads, shoulders, etc. That some of said products are pickled, some are smoked, and others go through sundry other processes, and some are sold fresh. That to allocate the proportional part of the tax so each article would be at the best of an uncertain and indefinite nature and difficult of legal proof. That plaintiff stores said various cuts and portions of said hog until sale thereof is available and different portions are necessarily marketed at different times and at greatly varying prices and that, therefore, tracing the relation of the price paid for each portion of such hog, including the processing tax, and the aggregate price obtainable upon sale of all of said portions of any one particular hog and at such various times and at different market or sales prices so as to prove the obsorption or nonabsorption of the said processing tax by plaintiff would be impracticable, uncertain, indefinite, thereby rendering plaintiff's action at law incomplete, inadequate and not as plain, speedy, adequate, full or complete a remedy as equity could grant by way of injunctive relief. That further, an accounting system necessary to trace such costs to the various portions of such hog would of necessity be cumbersome, weighty, costly and difficult to maintain. That such bookkeeping and accounting system would be in and of itself be a sufficient bar and hazard to plaintiff's remedy at law because of such cost, inefficiency and cumbersomeness aforesaid.

II.

That each, all and every of the amendments of said Agricultural Adjustment Act embodied in H. R. 8492

and known as the Amendments of August 27, 1935, are and each of them is void, invalid and unconstitutional upon each and every of the grounds set forth in plaintiff's original bill of complaint as reasons and grounds for the invalidity and unconstitutionality of the said Agricultural Adjustment Act prior to the making and taking effect of such amendments.

III.

That since the filing of plaintiff's original Bill of Complaint the taxes for each and every of the months subsequent to the month set forth in plaintiff's original Bill of Complaint, to and including the month of August, 1935, has become due and payable and plaintiff has been threatened with distraint and seizure of his property unless said taxes are paid upon demand of the defendant. That each and every of the things alleged in plaintiff's original complaint as results of any such distraint and seizure or imposition of any liens by defendant will result to plaintiff if defendant's threats since the filing of said complaint are carried out and made effective. That each and every of such acts of filing and imposing liens against plaintiff's property or distraining and seizing plaintiff's property will constitute additional, continual trespass against plaintiff and plaintiff's property and will result in various and sundry breaches of the peace, which will result in a multiplicity of suits, for the reason that said tort actions could not be joined together in one action at law and plaintiff would have no adequate, plain, speedy, complete and full remedy at law, as alleged in plaintiff's original bill of complaint.

WHEREFORE, plaintiff prays judgment as set forth in his original bill of complaint and hereby incorporates herein the said prayer of his original complaint by this reference, as fully as if the same were reiterated and restated herein.

CLAUDE I. PARKER AND RALPH W. SMITH,
By J. EVERETT BLUM
Attorneys, Solicitors and Counsel
for Plaintiff.

[Verified.]

[Endorsed]: Received copy of the within.....this 12th day of Sept. 1935. Peirson M. Hall, D. H. Atty for.....

Filed Sept. 13 1935 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MERCHANTS PACKING COMPANY, a corporation,

Plaintiff and Appellant,

vs.

NAT ROGAN Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7978

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY,

Plaintiff and Appellant,

vs.

NAT ROGAN Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7979

UNITED DRESSED BEEF COMPANY, a corporation,

Plaintiff and Appellant,

vs.

NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7980

POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

CLAUDE I. PARKER,
RALPH W. SMITH,
J. EVERETT BLUM,
Bank of America Bldg., 7th and Spring, L. A.,
Solicitors and Counsellors for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Defendants and Appellees.

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY,

Plaintiff and Appellant,

vs.

NAT ROGAN Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

UNITED DRESSED BEEF COMPANY, a corporation,

Plaintiff and Appellant,

vs.

NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

PRELIMINARY STATEMENT.

These points and authorities are submitted jointly on behalf of the above named appellants for the reason that the pleadings, issues and arguments in relation to each are identical and it could serve no useful purpose to submit individual briefs for each appellant. Each point and authority made and cited herein is made and cited on behalf of each of the appellants the same as though each appellant had submitted its individual points and authorities.

Wherever herein the singular is used we respectfully request of the court that it be considered in relation to each of the appellants.

STATEMENT OF CASE.

This is an application for preliminary injunction pending an appeal in the above entitled matter from an order granting defendant's motion to vacate a preliminary injunction theretofore granted.

The history of the case is stated in appellant's application for preliminary injunction pending appeal. It will serve no useful purpose to repeat it here. Suffice it to say that plaintiff after hearing in the court below was granted a preliminary injunction. That thereafter and after this court's decision in the *Fisher Flour Mills v. Vierhaus* case, defendant moved the trial court for an order vacating the preliminary injunction. The court, believing itself bound by this court's decision in the *Fisher Flour Mills* case, granted defendant's motion and dissolved the said injunction. Plaintiff has perfected its appeal to

this court, and pending the hearing on the merits thereof, makes this application, and submits these points and authorities in support thereof.

In this application all the facts alleged in appellant's complaint, amendments thereto, and its supplemental complaint are deemed to be true, there being no affidavits of defendants controverting such facts. Furthermore, for the purpose of the preliminary injunction granted by the trial court the allegations supporting appellant's right to an injunction were found to be true.

The Act Involved.

The Act involved herein is the Agricultural Adjustment Act as amended August 24, 1935.

The pertinent provisions to which we direct the court's attention are:

Section 1. "Declaration of Emergency".

Section 2. "Declaration of Policy".

Section 8. "General Powers of Secretary".

Section 9. (a) to (c) inclusive. "Processing Tax; methods of computation; rate; what constitutes processing; publicity as to tax to avoid profiteering."

Section 15 (d). "Compensating Tax".

Section 11. "'Basic Agricultural Commodity' defined".

Section 12 (a) and (b). "Appropriation; use of revenues derived from taxes; * * *"

Section 13. "Termination of Chapter."

Section 21, (a), (d).

Unconstitutionality of the Act.

The Act here involved is unconstitutional because:

1. It delegates Legislative Power to the Secretary of Agriculture.

Butler, et al. v. United States of America. Decided July 13, 1935, Circuit Court of Appeals, First Circuit. (The *Hoosac Mills* case), II U. S. Law Week 1064;

Schechter Poultry Company v. The United States, 55 Supreme Court Reporter, 837, 79 L. Ed. 888, decided May 27, 1935;

Panama Refining Co. v. Ryan, 293 U. S. 388.

2. The Act is not a Regulation of Interstate Commerce because slaughtering of hogs, growing crops, etc., is intra-state commerce.

Schechter Poultry Company v. The United States, supra;

Coe v. Errol, 116 U. S. 517;

Kidd v. Pearson, 128 U. S. 1;

Chassaniol v. City of Greenwood, 291 U. S. 384.

3. The Processing Tax is not in Reality a Tax.

Bailey v. Drexel Furniture Co., 259 U. S. 20. (Child Labor Tax case);

Penn v. Glenn, Vol. 1, Prentice Hall Tax Service 1935, paragraph 1243;

Loan Association v. Topeka, 20 Wall, 655;

Gebelein v. Milbourne (D. C. of Maryland). Decided August 13, 1935.

4. The Act Violates the Tenth Amendment. The Power Over intra-state business was not delegated to the United States.

Hamer v. Dogenhart, 247 U. S. 251;

Kidd v. Pearson, supra;

Slaughter House Cases, 16 Wall, 36;

Hill v. Wallace, 259 U. S. 44;

Champlin Refining Co. v. Corporation Com., 286 U. S. 210;

Williams v. Standard Oil Co., 278 U. S. 235;

People v. Neblia, 291 U. S. 502;

United States v. Knight, 156 U. S. 1;

Schechter Poultry Co. v. United States, supra.

5. The Act Violates the Fifth Amendment.

Louisville Joint Stock Land Bank v. Radford, 55 S. Ct. Rep. 854;

Railroad Retirement Board v. Alton R. R. Co., 55 S. Ct. 758;

Loan Association v. Topeka, supra;

United States v. Carlyle, 5 App. D. C. 138.

6. The Economic Emergency Does Not Create Power.

Schechter Poultry Co. v. United States, supra;

Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

Appellant's Right to Injunctive Relief.

The appellee, as he has contended throughout this case, will contend that section 3224 R. S. (Sec. 154 Title 26, U. S. C. A.) is a bar to granting an injunction against collection of taxes. But this section means no more than the general principles of equity meant prior to its adoption. 3224 R. S. was and is a mere crystallization of the familiar equity rule that injunctive relief will not be granted where there is an adequate remedy at law or unless the case, as such, finds its footing in "some acknowledged head of equity jurisprudence", as held in *Miller v. Nut Margarine Co.,* 234 U. S. 498. The section means this and nothing more. Any other interpretation might, as in the instant case, nullify the due process clause of the Fifth Amendment. We turn, then, to see whether appellant's suit has its footing in some acknowledged head of equity jurisprudence. We sincerely submit it has.

A. Has Appellant a Plain, Adequate, Speedy, Full and Complete Remedy at Law?

At the outset, we would like to call the court's attention to the case of *Standard Oil Co. v. Atlantic Coast Line R. Co.,* 13 Fed. (2d) 633, 637; Aff. 275 U. S. 257, wherein the court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity."

In the case of *Cable v. U. S. Life Ins. Co.,* 191 U. S. 288, the court said, at page 303:

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy or defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act."

See, also, *Atchison, Topeka & Santa Fe R. Co. v. Sullivan* (C. C. A. 8), 173 Fed. 456, where the court said at page 470 that "The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity", citing several cases.

In *Clark v. Pidgeon River Improvement etc. Co.,* 52 Fed. (2d) 551, at 557, the court said of remedy at law, "That remedy however, must be one that is adequate, speedy, plain and complete, not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation to accomplish the purposes of justice", citing many cases.

See, also, *Walla Walla v. Walla Walla Water Co.,* 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, where the court said at 346 (L. Ed.):

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy

at law, in order to exclude a concurrent remedy at equity must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity", citing cases.

See, also, to the same effect:

Barber v. Barber, 16 L. Ed. 226;

Tyler v. Savage, 143 U. S. 79;

Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct., 594, 32 L. Ed. 1005;

Union Pac. Ry. Co. v. Wild County, 247 U. S. 282, 62 L. Ed. 1110;

Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578, 15 Sup. Ct. 555;

Fredenburg v. Whitney, 240 Fed. 819.

Let us turn now to appellant's remedy at law and see if it is such a remedy as will oust equity of jurisdiction. The remedy at law is found in section 21 of the Act as amended August 24, 1935, and provides:

"Sec. 21. (a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy,

or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

* * * * * * * *

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commis-

sioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial pro-

ceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy."

Appellant alleges in its supplemental complaint and in its application for preliminary injunction before this court, that while it knows it is not passing said tax on, it cannot prove such as a fact. Appellant is a pork processor. The processing tax is levied on the live weight of the hog at the rate of $2.25 per live cwt. Not more than 75 per cent of the live hog is usable in the pork processing business. That 75 per cent is processed into a number of different cuts of meat such as loins, hams, bacon, roasts, shoulders, feet, head, trimmings, casings and numerous others. Some of such cuts are pickled, others smoked, others cured as fresh meat and others are otherwise treated. The length of time it takes to treat such cuts varies. The hog market is a varying one, so that appellant is treating hogs which it has purchased at various prices. Likewise, the treated meat market is a varying one so that appellant sells its treated meat at varying prices. Appellant does not and cannot tell which ham, for example, came from which hog, nor what price appellant paid for the hog from which any particular cut of meat came. Consequently, appellant cannot and does not vary its treated meat price in accordance with the cost of each individual hog from which the individual cuts of meat are taken. Therefore, appellant cannot apportion the processing tax to each individual cut of treated meat to determine whether it has or has not passed such tax or such apportioned part of said tax on.

We have, we believe, demonstrated that Congress has given us a theoretical remedy only, a remedy which is entirely unusable, impracticable and impossible of proof. It has in substance placed a "pot of gold at the end of the rainbow" and informed us that we can have it if we

can find the end of the rainbow and the road leading to it. Such is not a remedy, much less an adequate remedy at law.

There have been two courts which have expressed themselves on this particular question.

In *Baltic Mills Company v. Bitgood,* District Court of the U. S. for the District of Connecticut, Judge Hincks, in granting a temporary injunction, August 28, 1935, said of such proof:

> "The question at once will arise as to how a plaintiff seeking a recovery of a tax illegally exacted of him can establish that he did not pass it on to his vendee. The original authority for such taxes was by Act approved May 12, 1933, 48 Stat. 35. Obviously, a comparison of prices obtaining prior to the original imposition of the tax with the prices obtained in sales made two years later will not show whether a claimant under the Amendment had absorbed the tax or passed it on. Clearly in recovery proceedings neither the commissioner in the first instance nor the Court at a later stage will be bound by what the parties to a sale said or understood with reference to the incidence of the tax. For the Amendment, by its terms, is concerned not with intentions or understandings but rather by acts and their economic effects. Nor am I able to find in the Amendment any suggestion as to whether the incidence of tax is to be determined by the costs of the processor.
>
> If, under the Amendment, a processor seeking a recovery must, in order to establish that he did not pass on the tax, show that his sales were without profit, the Amendment affords no remedy at all to processors who sell at a profit. If, on the other hand, a

processor, through sales at a legitimate profit, opens himself to a suspicion that he has passed on the tax, he will be wholly without evidence to prove the contrary. In short, a processor who sells for the best price he can obtain won't know and can't know himself whether he has absorbed the tax or passed it on. It is thus apparent that the remedy afforded by the Amendment is uncertain. Assume, as the Amendment implies, that a processor *can* absorb the tax, and thus qualify as a meritorious claimant under the Amendment. He is as helpless as his competitor who has passed the tax along, to prove his case.

Moreover, the remedy afforded by the Amendment is cumbersome, involving a multiplicity of issues. To be sure, I should suppose that a claimant under the Amendment would not be precluded in a single proceeding from seeking recovery of taxes accruing in monthly succession. But in order to bring himself within the limitations of the Amendment discussed above he must prove the sale price of 'each article processed from the commodity with respect to which' the tax was imposed; and with respect to each such sale he must locate by proof the incidence of the tax. And if the processor in the course of his manufacture co-mingles some of the processed material with other non-taxable material, after a sale of the articles thus manufactured, he will be confronted with further complications in proving the incidence of the tax."

And in the case of *Armour & Company et al. v. Harrison,* District Court of the United States for the Northern District of Illinois, Eastern Division, in granting a temporary injunction, the court said of such proof:

"Now, I have been considering that proposition ever since I first heard of this. I am not wholly inex-

perienced with the trial of lawsuits, and I am familiar with the way counsel go about proving facts, and for the life of me I can not figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax. I have not been able to figure that out. I do not think he could. I do not think as a practical proposition he could, so I think these are just words, just words that mean nothing."

We have said that our remedy at law is not adequate because of the impossibility of proof. This court does not have to go that far to determine our right to injunctive relief. It need only determine that it is doubtful and uncertain that appellant could prove its absorption of the tax "to the satisfaction of the Commissioner of Internal Revenue" in order that equity will not refuse jurisdiction. For by such determination, it will by necessity determine, that appellant's remedy at law is not *as* adequate, *as* plain, *as* speedy, *as* full, *as* complete, *as* prompt or as efficient as our remedy in equity to the end that justice shall be attained, in line with the cases cited above.

In *Foster, etc. v. Haydel,* 278 U. S. 13, 14, 73 L. Ed. 147, 154 the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

"If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. Pennsylvania v. West

Virginia, *supra*; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716 726, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

Multiplicity of Suits.

We have alleged that unless an injunction is granted there will result between the parties to this suit a multiplicity of suits. This is founded on two theories, (1) That by reason of the processing tax being a monthly tax appellant will have to file a claim for refund for each such monthly tax paid. Each such claim for refund, upon rejection, gives appellant a right of action thereon, against which the statute of limitations starts to run on date of payment. As to each claim for refund appellant will be required to prove it did not absorb the tax paid for that month. It is highly conceivable and probable, assuming the proof possible, that the proof as to such absorption would differ from month to month, thereby necessitating different proof for each such right of action. There would be required a different finding for each such right of refund and therefore an individual record to establish each such right of action. A different and an individual judgment would have to be rendered on each such record.

This court has said of such multiplicity of suits, in *Fisher Flouring Mills Company v. Vierhus* and companion

cases decided August 15, 1935, that such does not constitute multiplicity of suits. The court, after remarking that there is no reference to this point either in the complaint or brief, goes on to discuss it. The court said that appellants could wait a prescribed period, bring one suit with the requisite number of causes of action and recover a lump sum. We respectfully submit that this is an incorrect interpretation of the rule that equity will not enjoin the commission of an act, when at plaintiff's option, he can maintain one suit or a multiplicity of suits. This rule is applied in cases where the plaintiff has a *present* right of action in which, by appropriate pleadings, he can get damages for future wrongs. An example of this is where injury to land by reason of its occupancy for railroad purposes is permanent. In such case plaintiff at his option can maintain multiple suits for continued trespasses or can maintain one suit for damages, both present and future. *Pensacola R. R. Co. v. Jackson,* 21 Fla. 146, 32 Corpus Juris 56.

The multiplicity of suits here involved is not one which can presently be avoided by one suit, but can only be avoided by waiting four years.

The real test for equity taking jurisdiction to avoid a multiplicity of suits is whether the assumption of jurisdiction by equity will *"make for justice". Vandalia Coal Co. v. Lawson,* 87 N. E. 47, 21 C. J. 73, and as further said in that case:

> "The modern, and we believe laudable trend of courts is to abandon the old and technical forms, to abbreviate litigation, to get at the heart of the case and decide it *without delay*—to save time and expense". (Italics ours.)

While we have searched diligently we have found no case squarely in point; that is, no case which decides the question—"Should equity decline jurisdiction because plaintiff by waiting four years can avoid a multiplicity of suits." All of the cases dealing with joinder of causes of action or more correctly stated, avoiding multiplicity of suits, at plaintiff's option are suits in which plaintiff has a present right of action and option.

See 21 *C. J.* 72 *et seq.;*
32 *C. J.* 56 *et seq.*

In *Postal Cable Tel. Co. v. Cumberland T. & T. Co.,* 177 Fed. 726, a telephone company attempted to charge increased rates to a telegraph company. The latter company brought a bill in equity to restrain such increase. HELD—plaintiff entitled to injunction, the court saying at page 734:

> "As to the defendant's argument that the complainant has a plain and adequate remedy at law, I am of the opinion that in view of the continuing nature of the demand made by the defendant and the multiplicity of suits to which complainant would have to resort to enforce its rights, if it should pay the increased rate and sue to recover the same the remedy at law would not be complete and adequate, and equity therefore has jurisdiction. *Donovan v. Pennsylvania Co.* 199 U. S. 279, 304, 26 Sup. Ct. 91, 50 L. ed. 192; *Northern Pac. Ry. Co. v. Lumber Manufacturers Ass'n.* (C. C. A. 9th Circuit), 165 Fed. 1, 91 C. C. A. 39. See also to the same effect Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326, 327 (Okla.)."

In *Hill v. Wallace,* 42 S. Ct. 453, 259 U. S. 44, 66 L. ed. 822, the U. S. Supreme Court held that for the tax payer there to have paid the tax and sued to recover it back would have amounted to a multiplicity of suits. Tho the question of waiting a long period of time and joining many causes of action in one suit was not discussed, the taxpayer there certainly had that option. We know of no internal revenue act which forbids such joinder of causes of action and the court in the *Fisher* case apparently went on the assumption that such was the law.

Sections 156 and 157 of 26 U. S. C. A. on which this court based its conclusion that the appellant in the *Fisher* case could join his 48 actions in one suit and thereby avoid multiplicity of suits were in effect when *Hill v. Wallace* was decided and therefore the plaintiff in that suit had the same opportunity of avoiding multiplicity of suits which this court ascribed to us in the *Fisher* case. See also *Lee v. Bickel,* 292 U. S. 419 where the law under consideration gave the taxpayer the right to pay the tax and sue to recover it back.

(2) The second type of multiplicity of suits to be avoided by the issuance of the injunction herein is relative to the continuous trespasses committed and threatened to be committed. Here the law is well settled that equity will take jurisdiction to settle once and for all the rights of the parties, which at law could only be settled by multiplicity of suits. As alleged in our complaints defendant, through various agents, is and will continue to and has threatened to commit continuous and repeated trespasses against appellant and appellant's property. For each such trespass appellant acquires an independent action at law.

Equity will take jurisdiction to avoid this multiplicity of suits.

32 C. J. 56 et seq.;

Carney v. Hadley, 32 Fla. 344, 14 S. 4;

Warren Mills v. New Orleans Seed Co., 4 S. 298, 7 Am. S. R. 671;

Postal Cable Tel. Co. v. Cumberland Tel. etc. Co., 177 Fed. 729.

Adequacy of Remedy at Law v. Multiplicity of Suits.

Let us consider in the light of the authorities above cited what the result would be if this court should hold there was no multiplicity of suits involved herein because of appellant's ability to wait four years and thereby avoid multiplicity of suits.

To deny appellants an injunction on the ground that there is no multiplicity of suits involved would be tantamount to saying, wait four years for your remedy at law. But to make appellants wait four years for their remedy at law is tantamount to saying, appellants have no adequate remedy at law, for then appellants remedy would not be as prompt, as speedy or as complete as equity can now grant, and under the decisions, equity should assume jurisdiction.

Standard Oil Co. v. Atlantic Coast Line R. Co., supra;

Cable v. N. Y. Life Ins. Co., supra;

Atchinson etc. R. Co. v. Sullivan, supra;

Clark v. Pidgeon River Improvement etc. Co., supra;

Walla Walla v. Walla Walla Water Co., supra.

In these cases it is held that the remedy at law must be as prompt and as speedy as in equity.

Therefore, if this court holds there is a multiplicity of suits, appellants are entitled to their injunction on this ground. If, on the other hand, this court holds there is no multiplicity of suits involved, then injunctions should issue because appellants then have no adequate remedy at law. If this court holds that appellants are not required to wait four years to sue, then this court is involving the parties hereto in a multiplicity of suits.

It is respectfully submitted that there is no other decision available as a decision that there is no multiplicity of suits and that there is an adequate remedy at law would be, we submit, contrary to the unbroken line of authorities.

Fisher Flour Milling Co. v. Vierhaus Is Not Decisive of These Cases.

The above case decided by this court August 15, 1935 is in no wise binding upon this court.

It has been repeatedly decided by the courts that general expressions in an opinion are to be considered relative to the case in which they are used and particularly in relation to the facts presented to the court. In a subsequent case, wherein the facts are dissimilar, the first case would not be binding.

We quote from only a few of an unbroken line of decisions which we believe will compel this court to hold that the *Fisher* case is not in point.

In *Cohens v. Virginia,* 6 Wheat. 398, the court said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Weyerhauser v. Hoyt,* 219 U. S. (55 L. ed.) 393, it is said:

> "If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohen v. Virginia, 6 Wheat. 399, 5 L. ed. 290, so often since reiterated and expounded by this court."

In the case of *Northern National Bank v. Porter Township,* 110 U. S. (28 L. ed.) 258-260:

> "It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this Court said in Cohens v. Virginia (the Court then quotes from that opinion . . ."

In *Daviess, et al. v. Fairbairn, et al.,* 3 How. (11 L. ed.) 760-766 it was said:

> "The attention of the court was not drawn to any other point than the one before them. They did not say that that part of the Act of 1776 which regulates the acknowledgment of a *feme covert,* which is wholly different from the above was repealed. It is true their language is general, but their meaning must be limited to the point under consideration. This decision, therefore, cannot be considered as having a bearing on the point now before us."

In the case of *Parsons v. District of Columbia,* 170 U. S. (42 L. ed.) 943-946, it is said:

> "In each case, therefore, where the party, whose property is subjected to the charge of a public burden, challenges the validity of the law under which it was imposed, it becomes the duty of the courts to closely consider the special nature of the tax and legislation complained of.
>
> It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable to another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict, than that which deals with the taxing and police powers."

In *Alexander v. Baltimore Ins. Co.,* 4 Cranch (2 L. ed.) 370 ,it is said:

> "It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best inexplicitly stated, as establishing important law principles."

In *Hans v. State of Louisiana,* 134 U. S. (33 L. ed.) 1, the court said:

> "It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial,* and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."

It is said in the case of *Northern P. R. Co. v. North American Telegraph Co.,* 230 Fed. 347, that

> "An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different."

In the Supreme Court of Virginia in the case of *Payne v. Jennings,* 144 Va. 126, decided in 1926, speaking of this rule the court says:

> "It is a rule of construction that the opinion of an appellate court must be construed in the light of the facts in the particular case."

Of the grounds here presented to this court in these applications, only one was before this court in the *Fisher* case, namely, criminal liability for nonpayment of the tax.

We present none of the other three grounds which the appellants therein relied on for injunction. Our grounds for such relief are totally different.

In the *Fisher* case, they allege the threat of legislation as affecting their remedy at law. We allege enacted legislation now in effect as affecting our remedy at law. They allege multiplicity of suits between them and their

customers. We allege multiplicity of suits between the same parties to this action. They allege the threat of their customers refusing to pay the amount of the processing tax to them. We allege that we have not, can not and do not pass the tax on, but absorb it.

Appellants have also alleged the threatened destruction of their business, the rendering valueless of their property, their inability to recoup their losses because of the inability of defendant to respond to a money judgment. We allege facts showing inadequacy of the remedy at law hereinabove set out. We allege facts showing that appellants will suffer great and irreparable damage and injury if the injunctions are not granted.

All these facts are before this court for the first time. They were not present in the *Fisher* case.

Further, there is before this court for the first time the effect of the amendments, now enacted in the law, to the Agricultural Adjustment Act.

Further, as stated in 7 *R. C. L.* 1005—

> "The doctrine of *stare decisis* is based upon the assumption that the rule of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the question involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort." Citing *Calhoon Gold Min. Co. v. Ajax Gold Min. Co.,* 27 Colo. 1; 83 A. S. R. 17; 5 L. R. A. 209.

There is a diversity of decisions on this important questoin among the Circuit Courts. The Circuit Courts for the Second and Tenth Circuits have granted just such injunctions as this court denied in the *Fisher* case. The U. S. District Court for the District of Maryland in the case of *Gebelein v. Milbourne, supra,* after an exhaustive trial has granted a permanent injunction on the same set of facts as here presented, save only for the introduction here of the aforesaid amendments. There is pending in the Supreme Court at least one case and there will be others, we are informed, dealing with the issues here involved. Therefore, under authority of the above R. C. L. quotation, the *Fisher* case has no binding effect here whatsoever.

And, lastly, as stated in *Miller v. Nut Margarine Co., supra,* each case for injunction must stand on its own merits. No hard and fast rule can be laid down.

Conclusion.

In conclusion, appellants submit that they have shown that there is at least serious doubt as to the constitutionality of the Agricultural Adjustment Act; that there is no adequate, plain, speedy, prompt, full, complete and efficient remedy at law; that there is a multiplicity of suits involved; that unless the injunctions are granted, appellants will suffer irreparable injury and damage, have their property and property rights rendered valueless, have many repeated trespasses committed against them by appellee and be unable in any manner to recoup their losses.

Upon the facts alleged in our complaints and the points herein made and authorities herein cited, appellants respectfully submit and contend that they are entitled to the issuance of a preliminary injunction as prayed for in their complaints.

Respectfully submitted

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNION PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
E. M. COHEE, etc., et al., Defendants and Respondents. No.

STANDARD PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNITED DRESSED BEEF COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

CORNELIUS BROTHERS, LTD., a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

ARMOUR & COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

Reply Brief of Appellants Upon Application for Injunction Pending Appeal.

(Continued on Inside Cover.)

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Circuit Court of Appeals
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MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
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CORNELIUS BROTHERS, LTD., a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.
ARMOUR & COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.

Reply Brief of Appellants Upon Application for Injunction Pending Appeal.

Separate petitions and briefs were filed in the cases above listed, all of which involve applications by packers for an injunction pending appeal from an order of the District Court of Southern California vacating a temporary injunction heretofore issued. The attorneys for the various petitioners have just been served with copies of a brief which is being filed on behalf of defendant and, with a view to clarifying the issues as far as possible in the short time available prior to the hearing, petitioners beg leave to file this joint brief in the above cases as the reply of each petitioner to the said brief of defendant.

While several statements appear in defendant's brief which seem to us to be misleading, we desire to call the attention of the court at this time to a statement which appears throughout defendant's brief and which is at entire variance with the facts. Defendant's counsel states repeatedly that the District Court denied the application for injunction pending appeal. It is argued that the determination so arrived at by the District Court should not be overturned by this court. The trial court's order, which is set out in the petitions, expressly provided:

> "That, in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this court that any relief in the form of supersedeas, whereby the temporary injunction here-

> tofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, *should be pursued by the plaintiff in the form of an application for an injunction pending appeal to be presented to said United States Circuit Court of Appeals for the Ninth Circuit* if the plaintiff wishes to secure such relief."

No other order, ruling or decision was made or announced by the trial court in connection with an injunction in the proceedings pending appeal. It also appears conclusively from the record that the trial court not only did not deny petitioners' application but deliberately failed to pass upon the same and in lieu thereof expressly directed petitioners to pursue such application in this court. Petitioners are now endeavoring to comply with said direction.

In the following portions of this brief by the term "petitioner," we shall refer to all the applicants above named.

We shall point out in this brief that

I. The showing made by petitioner of circumstances justifying equitable relief and of the facts relating to the application of the processing tax in question has not been controverted in any manner by affidavit, pleading or otherwise by defendant and stands ~~amended.~~ admitted

II. The order of the trial court vacating the temporary injunction and also his order in which he directed that petitioner pursue the present application before this court

was made solely upon the ground that the decision of this court in the *Fisher Flouring Mills* Case constituted a mandate from this court which prevented the trial court from exercising independent judgment or discretion in connection with such applications.

III. Prior rulings of the trial court, by which it was determined that the complaint stated a cause of action for relief in equity and that equity had jurisdiction, remain in full force and effect.

IV. An injunction pending appeal should be granted in this case in order to preserve the status, and especially in view of the fact that the legislation involved is subject to more than one construction is of doubtful validity and expressly provides that the remedy to which it remits the processor is contingent upon the final determination of the invalidity of the Agricultural Adjustment Act.

V. The prohibition of Section 3224 of the Revised Statutes and also the prohibition contained in the Agricultural Adjustment Act as amended against the prosecution of injunction suits to enjoin the collection of taxes does not apply to the situation presented by the present case where the showing of the inadequacy of the remedy at law and irreparable injury brings the case within a recognized head of equity jurisdiction under the rule of *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498.

VI. Petitioner has no adequate remedy at law by way of suit for refund of taxes paid.

VII. The fact that under the amendments there is no accurate method for computing petitioner's damage, and that the amount cannot be adequately proved, in itself requires equitable relief against the exaction of illegal levies.

VIII. The practical operation of the amended Act will result in a multiplicity of suits or at any rate a multiplicity of causes which will constitute that needless, vexatious and interminable litigation from which it is in the power of equity to grant relief.

IX. Plaintiff is properly in a court of equity. It has done equity throughout and has in every manner safeguarded the rights of the defendant. Defendant can suffer no harm by reason of the granting of the relief prayed for pending appeal.

X. Defendant's contention that plaintiff has been guilty of laches is entirely without basis in the record. No facts are present showing what defendant has done to conserve funds collected or to be collected in view of the apparent illegality of the Act.

XI. Answer to miscellaneous contentions of the defendant.

I.

The Showing Made by the Petitioner of Circumstances Justifying Equitable Relief and of the Facts Relating to the Application of the Processing Tax in Question Has Not Been Controverted in Any Way by Affidavit, Pleading, or Otherwise by Defendant and Stands Admitted.

The trial court on two occasions in which the question of the constitutionality of the Agricultural Adjustment Act was presented to it, held adversely to the defendant. The trial court, at the time of the granting of the temporary injunctions and in denying the motions to dismiss, adopted the minute order of Judge James in the Luer Packing Company case, in which he stated that "there is grave doubt as to the constitutionality of the Act." The senior judge further stated, "The court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an injunction, exclusive of any consideration of the fact that Congressional action is threatened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the court can give small weight because of its speculative and conjectural character."

II.

The Order of the Trial Court Vacating the Temporary Injunction and Also That Court's Order in Which It Directed That Petitioner Pursue the Present Application Before This Court Was Made Solely Upon the Ground That the Decision of This Court in the Fisher Flouring Mills Case Constituted a Mandate From This Court Which Prevented the Trial Court From Exercising Independent Judgment or Discretion in Connection With Such Applications.

The order vacating the temporary injunction, being the order of August 30, 1935, upon its face clearly and definitely shows and demonstrates that the temporary injunction was vacated for no other reason except the concept of the lower court that the decision of August 15, 1935 was a mandate to it to vacate injunctions in processing tax cases.

It is equally clear from the order allowing the appeal that the lower court, feeling itself bound by the mandate expressed in the order of August 15, 1935, expressly felt that all further relief, ~~in view of the expressions of~~ should come from the Circuit Court of Appeals, for the lower court apparently felt that to grant relief pending appeal would be tantamount to an avoidance of the mandate it felt was contained in the decision of August 15, 1935, denying an application for injunction pending appeal.

The difference between the facts presented in the present applications and the showing made by the applicant in the *Fisher Flouring Mills Company* case, also the important differences between the refund law as it stood on that date and as it has stood subsequent to August 24, 1935, have

been pointed out in the briefs heretofore filed. In view of these differences, both in the showing contained in the application and in the law governing the remedy of the claimant, the oft repeated assertion of defendant's counsel that the *Fisher Flouring Mills* case precludes the court from an independent consideration of the merits of the pending applications, is entirely unwarranted.

As impliedly held by this court in the *Fisher Flouring Mills Company* case, and directly held in previous decisions of this court, such as *Skagit County v. Northern Pac. Ry. Co.*, 61 Fed. Rep. (2d) 638, and consistent with the rule as announced in *Miller v. Standard Nut Margarine Co.*, the showing of the inadequacy of the remedy presents a recognized head of equity jurisdiction and the collection of the taxes will be enjoined.

It is not true, as stated several times in the brief of defendant, that the District Court in connection with the application for rehearing filed by plaintiffs, made any other or different order than as above referred to which had to do solely with the mandatory nature of the holding in the *Fisher Flouring Mills* case. Therefore, the District Court did not have before it, as asserted by counsel, all matters now before this court. Leave was granted to file supplemental complaints at the date of the application for rehearing and after the application for rehearing had been denied, the petitioners filed supplemental complaints. The supplemental complaints themselves, however, were not considered, nor did the court render any decision except to deny a rehearing of its ruling on the motion to vacate, its denial being based solely upon the mandate directed to it by this court in its decision in the *Fisher Flouring Mills* case.

III.

Prior Rulings of the Trial Court, by Which it Was Determined That the Complaint Stated a Cause of Action for Relief in Equity and That Equity Had Jurisdiction, Remain in Full Force and Effect.

The order of August 30, 1935 appealed from dealt solely with the question of the mandate contained in the opinion denying injunctive relief pending appeal in the *Fisher Flouring Mills* case. No appeal has been taken by the Government from the orders previously made denying the motion to dismiss and holding that the plaintiffs were properly in a court of equity and entitled to equitable remedies. We have reference now to the particular order appertaining to each cause, practically all of which by reference also adopted the opinion of the Senior District Judge as a part thereof. Furthermore, subsequent to August 30, 1935 defendants herein have applied for and received an order extending their time to plead to the complaints on file.

IV.

An Injunction Pending Appeal Should be Granted in This Case in Order to Preserve the Status, and Especially in View of the Fact That the Legislation Involved Is Subject to More Than One Construction, Is of Doubtful Validity and Expressly Provides That the Remedy to Which it Remits the Processor Is Contingent Upon the Final Determination of the Invalidity of Agricultural Adjustment Act.

There is little that can be added to the statement contained in the dissenting opinion of Judge Denman dated August 15, 1930 which can more clearly demonstrate the necessity of and propriety of injunctive relief in these causes, except to point out that since that decision the Act in question has been amended by the adoption of a number of provisions affecting the remedy of petitioner, which provisions are not only of doubtful meaning but even of doubtful validity and which expressly provide that the exercise of the remedy of the petitioner under the amendments is contingent upon the final determination of the invalidity of the Act.

V.

The Prohibition of Section 3224 of the Revised Statutes and Also the Prohibition Contained in the Agricultural Adjustment Act as Amended Against the Prosecution of Injunction Suits to Enjoin the Collection of Taxes Does Not Apply to the Situation Presented by the Present Case Where the Showing of the Inadequacy of the Remedy at Law and Irreparable Injury Brings the Case Within a Recognized Head of Equity Jurisdiction Under the Rule of Miller v. Standard Nut Margarine Co., 284 U. S. 498.

It is well established that plaintiff's right to injunctive relief is not barred by the provisions of section 3224 of the Revised Statutes if a showing is made of the inadequacy of the legal remedy or of other circumstances bringing the case within a recognized head of equity jurisdiction.

Miller v. Standard Nut Margarine Co., 284 U. S. 498;

Skagit County v. Northern Pac. Ry. Co., 61 F. (2d) 638.

By parity of reasoning the provisions of section 21 (a) of the amendments to the Act are not to be considered as an absolute bar to injunction suits. As stated in *Miller v. Standard Nut Margarine Co., supra,* it would require special and particular provision to acquire a construction which would prohibit resort to the relief which equity

affords in cases of inadequacy of legal remedy or other exceptional circumstances. The provisions of section 21 (a), by reason of the fact that they are worded in almost the same language as that to be found in section 3224 of the Revised Statutes, are under the accepted rule of construction to be considered as a re-enactment merely of the statute.

Heald v. District of Columbia, 254 U. S. 20.

If, on the other hand, section 21 (a) is to be construed as an absolute bar to injunction suits, it is unconstitutional if, under the circumstances set forth in the application, petitioner is powerless to enjoin the collection of the tax, it is deprived of all substantial remedy and, furthermore, it is denied equal protection of the laws and its property is confiscated in violation of the Fifth Amendment.

Graham & Foster v. Goodcell, 282 U. S. 409;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673.

Undoubtedly, however, the section should be given the construction which will render it constitutional, that is, if it is possible to give the section the same construction as that of section 3224 of the Revised Statutes.

Furthermore, section 21 (a) of the amendments prohibiting injunction suits does not purport to apply to taxes imposed prior to the date of the amendment.

VI.

Petitioner Has No Adequate Remedy at Law by Way of Suit for Refund of Taxes Paid.

The amendments to the Act, as introduced in the House, purported to take away altogether the right to sue for refunds. These provisions were changed by the Senate, and again changed by the conferees of both bodies. *It is petitioner's contention that the effect of the particular amendment, as actually passed, is to deny to the taxpayer the right to recover taxes illegally imposed just as completely as if the amendment had been adopted in its original form,—that is, as an absolute prohibition against recovery.*

Defendant asserts. at page 31 of his brief, that the remedy at law under the amendments is "none the less complete." The provisions of the Act, as amended, are not novel.

The *Gebelein* case held that amendments of this sort, if passed, would be sufficient to warrant a Court of Equity in issuing an injunction against the collection of the tax, the court saying, that the effect of these amendments "will be to withdraw altogether the right of the payers of this tax to sue for the recovery thereof or to impose *substantially* restrictive provisions on the right of the taxpayer to recover in such case despite the possible finding that taxes were illegally required to have been paid," and referred to the amendments as "a *distinct departure* from the long established policy of the Government with regard to recovery of taxes illegally exacted."

This departure from what has heretofore been regarded as an adequate remedy at law for illegally collected taxes is startling in several particulars.

In the case of taxes other than the processing taxes, persons paying the tax demands against them are entitled

(a) To bring suit against the Collector who received the tax (*United States v. Bird, Emery, Thayer Realty Company,* 237 U. S. 28), or his personal representative in the event of his death (*Patton v. Brady,* 184 U. S. 608).

(b) To bring suit against the United States in the District Courts of the United States, with certain limitations as to the amount in controversy (Sec. 41, para. 20, Title 28, U. S. C. A.), or

(c) To bring suit against the United States in the United States Court of Claims (Sec. 250, Title 28, U. S. C. A.).

Although in every instance it is required that a claim for refund shall be first filed with the Commissioner of Internal Revenue, and a waiting period of six months thereafter is required, to allow time for administrative consideration of the claim, the claimant is entitled to, and in fact must, prove his entire claim *de novo,* having only the burden of proving that the Commissioner's tax assessment was erroneous, and that the tax was not in fact due (*United States v. Anderson,* 269 U. S. 422; *Reinecke v. Spalding,* 280 U. S. 227).

The marked dissimilarities of procedure between the remedy provided by the amendments and the provisions governing suits for refund of income, estate and gift taxes illustrate clearly the entire inadequacy of the remedy to which the processer is remitted. In the cases of income, estate and inheritance taxes, the Board of Tax Appeals function *before* payment of the tax is required and tax-

payers are not bound to contest the tax before the Board of Tax Appeals, but may elect to pay the tax and pursue their remedies by suits for refunds in the courts; the Board of Tax Appeals is a separate and independent Federal agency outside the Treasury Department—the tax determining agency; and the Board sits in review of the determinations of law made by the Commissioner of Internal Revenue and hears and decides the case upon evidence *de novo,* as in suits in the District Courts (See *International Banding Machine Co. v. Commissioner,* 37 F. (2d) 660). The Board, in making the record reviewable by the courts, functions as does a District Court. It receives the case upon pleadings made pursuant to Rules of Practice, and receives evidence in accordance with the rules applicable to suits in equity in the Supreme Court of the District of Columbia. (See *Phillips v. Commissioner,* 283 U. S. 589, 595, 596.) The Board issues subpoenas, both to private parties and to the Commissioner of Internal Revenue, supervises the taking of depositions, and in all respects functions as independently of the taxing authorities as do the courts. It is required to make findings of fact and conclusions of law in deciding cases before it, and its opinions are officially reported. (Chapter 22, Sections 1211-1230, Title 26, U. S. C. A.)

In contrast, processing-tax payers must make their proofs at such informal hearings as the Commissioner shall see fit to prescribe, and before such of the employees of the Bureau of Internal Revenue as he may designate. Presumably (as indicated in paragraph (e) of section 21), employees of the Commissioner will make so-called field examinations of the accounts and records of the processing-tax payers, and these *ex parte* reports

will be part of the record before the court, something never permitted in cases of other taxpayers. The Commissioner, in apparently unlimited administrative discretion, may receive *ex part* affidavits and deny all rights of cross-examination of witnesses, or of his employees. It is difficult to conceive of a more incomplete, inadequate, or confused procedure then that authorized by section 21 of the amendatory legislation. Under these circumstances the meager powers vested in the courts by the amendments fall far short of providing the judicial determination guaranteed by the Constitution.

12 *Corpus Juris,* 1241;

Pacific Live Stock Company v. Lewis, 241 U. S. 440;

Porter v. Investors Syndicate, 286 U. S. 461;

Phillips v. Commissioner, 283 U. S. 589;

Crowell v. Benson, 285 U. S. 22;

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14.

The constitutional right to jury trial, which exists in tax refund cases (*Garnhart v. United States,* 16 Wall. 162), is denied. A dependent governmental official is constituted both judge and jury and the record of the cause is made by him.

Entirely aside from constitutional objections and the question of the lack of due process, it is obvious that the remedy to which the processer is confined by the amendments is not sufficiently complete, adequate or available to meet the situation which faces the processor.

It may be suggested that the court should assume that the Commissioner will make provisions for proper judicial determination of the questions of fact and law, but it is

submitted that rather than subject petitioner to the risk of irreparable injury through failure of an adequate remedy at law, it is necessary to maintain the injuction until the doubts and difficulties created by the Act have been cleared up and appropriate administrative procedure established.

In any event, the portion of section 21 as amended which bars petitioner from recovering processing taxes which it cannot prove have been passed on to others is without justification.

The Collector may not, in a court of equity, resist a suit brought to enjoin him from illegal seizure of petitioner's property, upon the ground that petitioner has exacted or will be able to exact, an equal amount from the petitioner's vendee or some other person. (Deft's. brief, p. 40.)

That grounds exist which would justify the courts in denying refunds of constitutionally imposed taxes to others than the purchaser who has in fact borne the tax burden, the taxes being upon the sale, and the truth in this respect can be easily established, as in the case of *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, is no reason for permitting the Collector to proceed with confiscation of petitioner's property if the processing taxes are in fact unconstitutional and void. It is only where the courts have been open to the taxpayer for plain and adequate redress that preliminary relief by courts of equity from unconstitutional exactions has been refused. (*Miller v. Standard Nut Margarine, etc. Co.,* 284 U. S. 498, 59 F. (2d) 79.) If the limitations of remedy provided by the amendments are upheld, then there is no limitation whatsoever to the power of Congress to impose illegal and unconstitutional exactions so long as the per-

son on whom the tax is imposed is capable of shifting the burden to another. Congress is without power to withdraw its consent to be sued where the direct effect is to confiscate property in violation of the Fifth Amendment, nor can Congress by failure to provide remedies amounting to due process reach the same result. Even though the remedy to which petitioner is restricted by the Act as amended should be held due process, the court must still determine whether the remedy is so inadequate, doubtful or cumbersome as to warrant the granting of the relief of equity.

The requirement that the processor prove that he has not directly or indirectly included the amount of the tax in the price is uncertain for the reason that there is no way to determine the application of the provision to a sale where the tax is not added to the sales price as a distinct item. The further burden of proof required of the processor, to show that no part of the tax was "passed on" to the vendee, is even more puzzling and might be regarded as applying to any transaction where the amount of the tax was regarded as a part of the cost of manufacture. Any finding made by the Commissioner on such issue is bound to be entirely conjectual. The question of the proper margin of profit for the processor is undetermined nor is there any criterion for the allocation of profits or losses to the items of tax and manufacturing cost. Any conjecture or opinion which may be reached by the Commissioner would be affected by innumerable economic factors and matters incapable of legal proof, either affirmatively or negatively, and any conclusion must necessarily be based upon entirely arbitrary formulas or rules. The District Court, upon review of the Commissioner's findings, is not presented with an intelligible

basis for the review. Equally impossible of proof is the requirement that the processor show that the tax has not been passed back to the farmer. The requirement that the processor present proof upon matters which are not susceptible of proof or even conjecture and innumerable factors concerning which only the vaguest sort of opinion can be reached, makes it impossible for the taxpayer to obtain redress. A processing tax cannot be earmarked against any particular sale. The fact that all or part of a tax has been or may possibly be passed on creates no equity in the Government. The relations between the processor and his customers may be affected, depending upon the terms of the contract between them, but this furnishes no defense to the Government in an action to restrain the collection of the tax in the first instance. If the injunction is denied on the ground that the refund provision is adequate, then any type of illegal exaction may be enforced against a manufacturer or vendor upon the plea that it has, in fact, been passed on to the public.

Finally, the provision by which the claimant is required to prove that he has not passed on "any part of such amount" apparently precludes recovery of any taxes paid, whether the claim is based on the amount not passed on or on the entire amount. This provision alone is so inadequate on its face and so uncertain in its application as to render the refund remedy inadequate.

Superficially examined, the case of *United States v. Jefferson Electric Mfg. Co., supra,* may appear to support appellee. The decision, however, has no bearing whatsoever on the question of whether the remedy provided by the present act constitutes an adequate remedy at law. The court pointed out that section 424 of the

Revenue Act, which was there in question, *made no changes in the existing system of refunds.* The court said at page 397:

> "It does not purport to commit the decision of claims for refund exclusively to the Commissioner or to give finality to his denials, or to take from aggrieved claimants the right to sue on their claims after denial or inaction by him, or to withdraw from the courts power to entertain such suits." (Quoted in appellee's brief, p. 33.)

The Commissioner under that section was not the fact-finding body and did not create the record in the case, and the taxpayer was permitted to sue *de novo* in the District Court or the Court of Claims upon his claim. Again the Act applied only to refunds on sales taxes. *Indian Motorcycle Co. v. United States,* 283 U. S. 570. The tax being a tax on the sale, the purchaser was the real party in interest unless the manufacturer could prove he had borne the burden of tax, which is one of the items making up the cost of operation. On the other hand, the processing tax is not upon the sale but upon the first act of manufacturing. *Cornell v. Coyne,* 192 U. S. 418. The purchaser is not the real party in interest because the tax does not operate upon the sale to the purchaser.

It is pointed out in appellant Armour & Co.'s brief, pages 21 to 23, that the statute here involved by its terms places a more severe requirement of proof on the claimant, in that the claimant must show that he has not included the tax in the sale price of any article processed

from a commodity, and that he has not passed on any part of the amount to the vendee, or any other person, in any manner; also, that the price paid by the claimant was not reduced by any part of such amount. The amendments to the Act now under consideration also fail to provide the alternative remedy given to the taxpayer which was discussed in the *Jefferson* case, of putting up a bond to reimburse the purchasers, in lieu of proof that the manufacturer had himself borne the burden of the tax. Practical operation of the Act in the present case is altogether different from that of the Act before the court in the *Jefferson* case for the tax here is not upon the identical articles sold but upon the hog from which the articles sold have been converted. The *Jefferson* case holds merely that the provision there discussed amounted to due process under the circumstances of that case, but the presence of due process is not determinative of the right to equitable relief although its absence may require such relief. Likewise, the Act before the court in the *Jefferson* case did not contain the additional restrictions now imposed upon the taxpayer with reference to the time in which the claim must be filed, the necessity of one year's delay in prosecuting the action, and that upon any review of the Commissioner's ruling, the reviewing court be confined to the record as made by the Commissioner.

Until the provisions of the Act have received judicial interpretation by the Supreme Court it is impossible to say what a claimant's rights are. Relief should be granted until all doubt is removed. The Supreme Court in two

recent cases has held that any doubt as to the construction or uncertainty as to the operation of a refund statute warrants granting of an injunction against the collection of taxes.

> *Union Pacific R. R. Co. v. Weld County,* 247 U.S. 282;
>
> *Atlantic Coast Line v. Daughton,* 262 U. S. 413.

The amendments in question are entirely novel and constitute a complete departure from existing refund remedies. Obviously, the adequacy of the remedy is seriously impaired, if not entirely destroyed. It follows that even though more than one meaning may be given to the amendments in question, the remedy therein provided is so uncertain that equity should take jurisdiction until the doubt has been removed through a final decision of the Supreme Court.

As clearly and precisely stated in the opinion of Judge Hincks in the *Baltic Mills* case in the District Court of Connecticut, granting a temporary injunction against the collection of processing taxes, discussing the remedy afforded by the Amendment:

> "Moreover, the remedy afforded by the Amendment is cumbersome, involving a multiplicity of issues. To be sure, I should suppose that a claimant under the Amendment would not be precluded in a single proceeding from seeking recovery of taxes accruing in monthly succession. But in order to bring himself within the limitations of the Amendment discussed above he must prove the sale price of 'each article processed from the commodity with respect to which'

> the tax was imposed; and with respect to each such sale he must locate by proof the incidence of the tax. And if the processor in the course of his manufacture co-mingles some of the processed material with other non-taxable material, after a sale of the articles thus manufactured, he will be confronted with further complications in proving the incidence of the tax. In this connection, it must be observed that in U. S. v. Jefferson Electric Co., 291 U. S. 386, the taxes involved were excise taxes which by nature differ materially from 'taxes' contemplated by the A. A. A. Moreover in the 'recovery' statute under consideration in that case, Revenue Act of 1928, Sec. 424, express provision was made for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax,—a provision wholly absent from this Amendment."

It is therefore submitted that the requirements of the Act as amended, in connection with the payment of the processing tax, render the said remedy entirely futile.

As pointed out in petitioners' briefs, including that of appellant, Armour & Company, the ~~provision~~ prevention of a full right of review is in itself sufficient to constitute the remedy inadequate; likewise, the uncertainty of the provisions and their doubtful constitutionality are in themselves sufficient to render the remedy inadequate. The uncertainty of the provisions is strikingly illustrated by the refusal of counsel for defendant to assume a definite position with respect to any of the provisions of the amended Act, or on any of the questions raised involving either the construction or validity of the Amendment.

The provision as to the quantum of proof required is so exacting and arbitrary under the circumstances that we feel it merits separate discussion.

VII.

The Fact That Under the Amendments There Is No Accurate Method for Computing Petitioner's Damage, and That the Amount Cannot Be Adequately Proved, in Itself Requires Equitable Relief Against the Exaction of Illegal Levies.

It is asserted in defendant's brief that plaintiff has "a complete remedy at law under the provisions of the act itself. *If it cannot supply the evidence to sustain this allegation it is no better in its equity action than it would be at law,* for as heretofore pointed out if the provision requiring such proof is valid it must be made in equity as well as in law . . ." (p. 40).

The true rule is the exact converse of this statement. It is well settled the fact that there is no certain method for computing the amount of the recovery at law or for adequately proving the amount of damages is in itself, and without regard to any other circumstances, sufficient to give equity jurisdiction and entitles a party to equitable relief.

In the equity action, unlike the law action, it is unnecessary to prove the extent of the loss. It is only necessary to show that there will probably be some loss; the amount is immaterial.

In the law action plaintiff cannot recover the difference between the amount of the processing tax which it cannot prove it did not pass on and the amount of such processing tax which it actually did not pass on. It is this latter amount which plaintiff is entitled to recover under any view of the amendments. As shown in the petition, it cannot recover this latter amount—which it is entitled to recover both in law and in equity—even though it shall equal the full amount of the tax, due to the absence of

any certain method, under the circumstances, for computing the amount not passed on or for adequately proving such amount.

As stated in 32 *Corpus Juris,* pp. 62, 63, Sec. 40:

> "An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be *accurately computed,* or where the amount cannot be *adequately proved.*" (Italics ours throughout.)

In *Texas Co. v. Central Fuel Oil Co.* (C. C. A. 8), 194 Fed. 1, 11, 12, an order dismissing the bill was reversed with directions to grant a preliminary injunction to prevent violation of a monthly installment contract to deliver crude oil. The court said:

> "The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. It is a well-known fact, of which courts are bound to take judicial notice, that oil is fugacious, and may be drawn away by strangers through other wells. The flow of the wells decreases in the course of years, and long before the expiration of this contract these wells may become entirely dry. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment."

And the the question of multiplicity of actions:

> "If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period

has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper."

Texas Co. v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1, 11, 12.

The case was followed in *Marquette Cement Mining Co. v. Oglesby Coal Co.* (D. C. Ill.), 253 Fed. 107, 117, where the court said:

"Equity jurisdiction was sustained, because plaintiff *could not recover all the damages it might sustain, and because they were impossible of proof*, the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective."

Marquette etc. Co. v. Oglesby Coal Co. (D. C. Ill.), 253 Fed. 107, 117.

In *Angier v. Webber,* 14 Allen 211, 92 Am. Dec. 748, 750, in a decision by Justice Bigelow, the court said:

"For this violation of their covenant the plaintiff is entitled to relief in equity. An action at law will furnish no adequate remedy. The damages are in their nature such as not to *be susceptible of proof or exact computation;* and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy."

Angier v. Webber, 14 Allen 211, 92 Am. Dec. 748, 750.

Columbia College of Music, etc. v. Tunberg (Wash.), 116 Pac. 280, 282:

> "To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable, in the sense that they could be *estimated only by conjecture* and not by any accurate standard."
>
> *Columbia College of Music, etc. v. Tunberg* (Wash.), 116 Pac. 280, 282.

In *Crouch v. Central Labor Council* (Ore.), 293 Pac. 729, 732, the court said:

> "There is no standard by which the amount of that damage can be measured with reasonable accuracy. Irreparable damage does not have reference to the amount of damage caused, but rather to the difficulty, not to say impossibility, of measuring the amount of damages inflicted."
>
> *Crouch v. Central Labor Council* (Ore.), 293 Pac. 729, 732.

Chas. C. Wilson & Son v. Harrisburg (Me.), 77 Atl. 787, 791:

> "Where the extent of a prospective injury is uncertain or doubtful, so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury."
>
> *Chas. C. Wilson & Son v. Harrisburg* (Me.), 77 Atl. 787, 791.

In *Pitts v. Carothers* (Miss.), 120 So. 830, 831-832, the court, quoting a contention of appellant similar to that here made by defendant, said:

> "He says: 'If damages are so remote and so speculative that they cannot be determined or ascertained with any degree of accuracy, then, under our law, there is no damage, and if no damage, no injury, and if no injury, certainly there was no right for the granting of a mandatory injunction.' *Unwittingly appellant has furnished one of the definitions of irreparable injury under the rules of equity in reference to injunctions.* An injury is irreparable when it cannot adequately be compensated in damages or where there exists *no certain pecuniary standard* for the measurement of the damages. Where the *extent of the prospective injury is uncertain or doubtful* so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury. To render an injury irreparable it is not necessary that the pecuniary damage be shown to be great, but, on the contrary, the fact that in an action at law the jury could award only nominal damages often furnishes the very best reason for interference by a court of equity by injunction."
>
> *Pitts v. Carothers* (Miss.), 120 So. 830, 831-832.

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100:

> "To estimate with substantial accuracy the amount of water furnished by each of the springs, respectively, will be very difficult. The uncertainty of the supply will tend to render the contracts of the orators to supply others uncertain. The extent of the in-

> juries to the orators, and the consequences resulting therefrom, will be difficult of estimation. In wet weather the orators may not be injured in the least. To ascertain the just measure of damage from the threatened acts of the defendant, if carried out, will be well-nigh impossible. Such an injury, in a legal sense, is irreparable; and a writ of injunction is not only permissible, but is the most appropriate and only adequate remedy."

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100.

The showing made in the petition herein and in the record before this court, from which it appears that there is not only no method or standard of computing the petitioner's damage but their is no possibility of proving the amount of recovery under the Act as amended, has not been controverted in this case otherwise than by the unsupported assertions in defendant's brief that if plaintiff is "able to determine that it is conducting its business at a loss then it is submitted that plaintiff is also able to determine the amount of the tax that is passed on" (p. 35) and the statement that if the petitioner is in a position to inform the court that it lost money, then it certainly can determine the amount of money which it lost by reason of its inability to pass on the tax (p. 38).

Counsel's argument is that if petitioner is able to determine that there has been a loss, it obviously is able to determine the amount of the loss. Obviously, this does not follow; nor would it follow, as counsel for defendant seems to imply, that even if plaintiff could establish the

amount of its loss in any month, it could from such amount determine the amount of its loss by reason of the processing tax. Defendant has never at any time suggested and counsel have not been informed of any method whatsoever by which petitioner may prove, as he is required to do under the Act as amended, the sales price of each "article processed from the commodity with respect to which" the tax was imposed and with respect to each such sale established by proof the incidence of the tax. Such proof, as appears from the petition herein, is entirely unavailable.

At several places in defendant's brief the statement is made, without supporting argument or authority, that it is incumbent on petitioner to show affirmatively in this present proceeding *"the complete status of its business"*, including other than "hog products", even though such products are in no way affected by the tax nor can any facts with reference to such products be considered pertinent to any inquiry involved in this suit (p. 39).

If an answer to this contention is necessary, it is found in the case of

Oliphant v. Richman (N. J.), 59 Atl. 241, 242,

where the court said:

> "Irreparable damage does not mean that the complainant must show that *all his financial transactions* will be ruined unless the relief sought is granted. It means that, *with reference to the particular right or property referred to in the bill* of complaint, the complainant will be irreparably deprived of it unless the relief sought is granted."
>
> *Oliphant v. Richman* (N. J.), 59 Atl. 241, 242.

VIII.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which It Is in the Power of Equity to Grant Relief.

The very origin of equitable jurisdiction was intended to supplant definite and limited legal remedies and for that very reason some of the precepts of equity cannot and should not be bound by the form but rather by the scope of the application. As we have previously pointed out, it is possible in this case to confine the action to a single complaint and summons and in such complaint set forth separately the causes appertaining to each taxable period. It can be readily seen, however, that this in itself could not avoid the concept of multiplicity. Multiplicity would still exist as the taxpayer, petitioner herein, would have to offer the type of proof required under the amendments as to each and every taxable period not only under the terms of the Act as to any matter occurring after the adoption of the Act but for and to all taxable periods ever since the inception of the Act applicable to hog processors, to November 5, 1933. We believe that it has been summarily stated that more than a thousand suits at the present time are pending throughout the United States in Federal courts. It can readily be realized what effect upon the rights of a litigant this mass of litigation requiring separate proof of each and every taxable period of one

month each since November, 1933, and as to each sale and purchase and each process of manufacture will have upon the adequacy of the relief obtainable in all actions. Likewise as to each taxable period and the transactions thereunder, proof will have to be submitted to the Commissioner of Internal Revenue and his adjudication awaited by the taxpayer before the taxpayer can proceed in an action at law. It is interesting to note that under the Act, the transcript of the Commissioner being a legal prerequisite to the trial of the action, what may happen to the rights of the taxpayer in the event that the Commissioner, through pressure of business, is unable to determine the status. The taxpayer, not only in the institution and prosecution of a suit, but so far as the preparation of the review is concerned, is apparently left to the mercy of any delay in the Commissioner's office.

Under the Act, the Commissioner of Internal Revenue is the ~~right~~ trial tribunal for the determination of the rights of the taxpayer as far as refunds are concerned. The District Courts act only as courts of review, for under the Act they must consider the transcript adduced before the Commissioner of Internal Revenue has the record of the case. Until the Commission has set the matter for hearing and hearing had thereon and a record completed and certified thereof, the taxpayer cannot proceed to have any court review the Commissioner's findings. That the question of multiplicity cannot be narrowly construed is best illustrated by the case to which the appellee has directed us, *Hale v. Allison,* 188 U. S. 56, and we repeat at this time the excerpt thereof:

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided *upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied;* these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will *practically* prevent a multiplicity of litigation and will be an *actual convenience* to all parties, and will not unreasonably overlook or obstruct the material interests of any."

The amendments to which we have reference above to the Act, of course, were not in effect on August 15, 1935 at the time the court considered the *Fisher Flouring Mills* cases and in fact in the *Fisher Flouring Mills* cases the court carefully directs the attention of all parties to the fact that it ~~cannot~~ expressly refuses to consider the proposed legislation for the mere reason that it had not been enacted.

It is readily seen that an application for refund remedy provided by the Act as amended will result in exactly the same situation as that before the court in *Hill v. Wallace,* 259 U. S. 54, for the reason that the same detail of proof will be required as of each individual transaction.

Obviously, the question of multiplicity is not determined by the mere number of suits permitted or required but rather by the substantial difficulty of the litigation entailed. There may be decisions in which the necessity of monthly suits or presentations of claims has been held not necessarily to result in a multiplicity of suits in the equity sense but we have not been cited to such decisions. In petitioner's brief two cases have been cited where monthly suits have been required under circumstances involving much less hardship than the refund remedy under discussion and such litigation has been held to amount to multiplicity of actions in the equity sense.

> *Postal Cable Telegraph Co. v. Cumberland T. and T. Co.,* 177 Fed. 726;
>
> *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.,* 111 Pac. 326.

To the same effect is the case of

> *Texas Co. v. Central Fuel Oil Co.,* 194 Fed. 1, *supra.*

Certainly, if the practical necessity of monthly suits is ever to be regarded as constituting a multiplicity of actions, the present case on this ground alone is a situation where equity will relieve from the hardship of unnecessary and interminable litigation.

IX.

Plaintiff Is Properly in a Court of Equity. It Has Done Equity Throughout and Has in Every Manner Safeguarded the Rights of the Defendant. Defendant Can Suffer No Harm by Reason of the Granting of the Relief Prayed for Pending Appeal.

Plaintiff is properly in a court of equity. Its right to relief has been sustained after thorough consideration both of argument and of presentation of briefs and independent consideration by all of the judges of the district in which petitioners are located. It has resorted to relief speedily after holding by courts of high resort that similar legislation was invalid. In addition thereto, pending determination of suits until the vacating of the temporary injunction, it has impounded funds sufficient to pay the tax due and accruing taxes, together with any penalties that might appertain thereto. This protection of the rights of the defendant has been either in the form of the deposit of cash with the clerk of the court or by giving surety bond with good and adequate surety. No harm can be suffered by the defendant by reason of the relief prayed for pending appeal.

The processing tax applies solely to hogs handled by petitioners. It does not apply to any other product, but defendant's assertion that profits and losses of other parts of its business should be considered in granting relief, serves to indicate the complexity of the situation and that equity must intervene to afford a substantial remedy to the litigants.

X.

Defendant's Contention That Plaintiff Has Been Guilty of Laches Is Entirely Without Basis In the Record. No Facts Are Present Showing What Defendant Has Done to Conserve Funds Collected or to Be Collected In View of the Apparent Illegality of the Act.

Defendant devotes a portion of his argument to asserting that the plaintiffs herein have been guilty of laches. It is difficult to understand in what manner such fault can be attached to the plaintiffs. The plaintiffs have paid their taxes so long as no grave doubt was shown as to the validity of the law under which the taxes were levied, assessed, and collected. The defendants here are not in a position to assert that the plaintiffs had no right to assume that a law enacted by Congress was a valid exercise of legislative power as granted to it by the Constitution. It was not until after the decision in the *Schechter* case that grave doubt became apparent as to the validity of the Act. The plaintiffs were not advised of or given notice in any manner or charged with any notice of any act where the position of the defendants was in anywise changed. It can not be successfully maintained that plaintiffs are obligated to pay taxes unless there is a valid, statutory enactment for the assessment levied and the collection of a tax. Unless a tax can

be collected from the plaintiffs under a valid enactment, no right exists on the part of the defendants to collect any money. This point was considered in the case of *Gebelein, Inc. v. Milbourne,* in which judgment was given for the plaintiff in the District Court in Maryland in a case involving the question of processing taxes. In the *Gebelein* case the taxpayer showed financial impoverishment through the operation of the tax. Likewise, there the defendant collector urged laches as a defense and the court, in speaking of the situation there particularly prevailing, says:

> "It would seem rather that the taxpayer is entitled to credit for its effort to co-operate with the Government in paying the tax so long as it was financially possible for it to do so."

It is but fair to state to the court now that the question of laches, though not set forth as a ground by the defendants in the original motion to dismiss, was nevertheless urged at the time the motions were heard upon the respective judges of the District Court and fully presented before the denial by said judges of the motion to dismiss.

XI.

Answer to Miscellaneous Contentions of Defendant.

It is asserted in defendant's brief, at pages 14 to 21, that hardship is not a ground for enjoining the payment of tax. However, the case presented here is not one of hardship merely but of illegal exaction on the part of the Government leading to irreparable injury and presenting a situation universally recognized as affording equitable relief.

It is suggested, on pages 19 and 20 of defendant's brief, that by making a deposit in court, or offering to put up a bond, the plaintiff refutes the allegations with reference to hardship. Obviously, however, it is only by this method that plaintiff can ever prosecute an action and obtain a determination that the taxes were illegally assessed. Even if such a determination could be obtained otherwise, it would not be beneficial as a practical matter due to the withdrawal by the recent legislation of all reasonable redress.

The defendant in several instances in his brief, particularly on page 14, draws the unwarranted conclusion that the processing tax has been passed on to the public. The allegation contained in each of the complaints is to the effect that plaintiff's business, ever since the inception of the tax, has been and is now carried on at a loss. If pe-

titioner is carrying on business at a loss, it certainly has not passed on the tax. The additional element presented, however, is that the amount of the loss does not establish that any part of the tax has been passed on to plaintiff's vendees. The element of profit on inventories by reason of advancing markets has reduced the loss occasioned by the fact that the tax is being absorbed and not passed on, but petitioner has demonstrated in its petition for relief here that this element is not susceptible of computation.

Defendant further, on page 24 of his brief, claims that prior hereto an action could have been commenced on the law side and determined as to whether or not the tax exaction is legal and whether petitioner should recover the taxes paid. Pendency of the *Hoosaic* case even at this time is sufficient answer to that. The Collector certainly would not abide by a decision of a lower court in a single case. The determination whether on the law side or the equity side would have to be a final determination. All petitioners are praying in effect, and what they received at the hands of the district courts in the first place, is injunctive relief during the pendency of such final adjudication. We believe defendant's argument best illustrates that equity should interfere to hold the status of the parties in abeyance until final adjudication.

Defendant also asserts with apparent confidence, on pages 42 and 43 of his brief, that the present application is from an order denying an injunction pending appeal in

the District Court, and that that court's exercise of its discretion should not rightly be overruled. As pointed out herein, it is obvious from an examination of the only order made by the court in connection with this matter, by which petitioner was directed to apply to this court, as is now being done, the situation presented is not one of the exercise of discretion by the trial court and a review thereof upon its denial of the application, but rather, its refusal to exercise such discretion and express direction to present the matter to this court.

There are other miscellaneous suggestions occurring in defendant's brief which are equally unwarranted, but which lack of time prevents us from discussing. We request, and trust, that the court will not treat our failure to refer to such suggestions in this brief as a concession of their validity.

Conclusion.

No sufficient reason has been presented in defendant's brief for denying plaintiff the relief sought by this petition. On the contrary, the various arguments and assumptions of defendant illustrate that even the amended remedies may be of doubtful validity and are certainly of doubtful meaning and application. All of these matters will have to be dealt with in the presentation of authority in support of the appeal itself. This, together with the

expressed intent appearing upon the face of the amendment, of the framers thereof, that remedies and claims should await the final adjudication of the validity or invalidity of the Act, make this a particularly appropriate case for the exercise of the equitable power of the court, and we therefore request that the rights of the litigants be held in abeyance until such final adjudication or sooner determination of this appeal.

All of which is respectfully submitted,

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BENJ. W. SHIPMAN,
Attorney for Appellant Union Packing Company.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
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STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

Ralph V. Hunt, being first duly sworn deposes and says:

That he is a citizen of the United States and the State of California, over the age of 21 years, to wit, of the age of 38 years; that he is and has been for more than six years last past a Certified Public Accountant duly licensed and admitted to practice as such in the State of California; that for more than nine years last past affiant has been employed by and connected with the national firm of Certified Public Accountants known and designated as the firm of Ernst and Ernst; that said firm of Ernst and Ernst, among many other employments and engagements, is the official auditor and accounting consultant of the Metropolitan Water District of Southern California (a project involving the expenditure of a sum in excess of $200,000,000.00); that as an employee of said firm of Certified Public Accountants affiant is in direct charge and supervision of such auditing and consultation of and with said Metropolitan Water District of Southern California; that as a part of affiant's said duties in supervising said auditing and said accounting consultation work it is necessary that affiant be thoroughly familiar with and affiant avers that he is thoroughly familiar with and understands the varied and intricate cost accounting procedures and allocations of all departments and divisions of said gigantic project.

That in addition to said duties of affiant involved in his said firm's said engagement with said Metropolitan Water District of Southern California, and in many and other professional engagements of his said firm, including the auditing and accounting consultations with meat packing

concerns, affiant specializes in installation of accounting systems and consultation relative to accounting procedure and cost accounting problems. That based upon affiant's said certificate as a certified public accountant, his experience, training and practice, affiant is thoroughly familiar with all phases of accounting and cost accounting procedure in all lines of business, including that of the meat packing industry.

That included among the professional engagements of said firm of Ernst and Ernst are auditing and accounting consultation engagements with meat packing concerns within the State of California and throughout the several states of the Union.

That affiant has examined that certain act commonly known as the Agricultural Adjustment Act, and particularly Section 21 thereof, as amended. That affiant's interpretation of said section of said Act as amended, and particularly paragraph (d) thereof, which interpretation affiant is advised by counsel is fair and reasonable, is as follows, to wit: Under paragraph (d) of said Section 21, the appellants herein will be precluded from securing refunds of any taxes heretofore or hereafter paid by them, even though such taxes are unconstitutional or invalid, unless the appellants establish that they have not, either directly or indirectly, included the amount of such tax in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner; that when paid by appellants, said taxes become part of the cost to them of the product which they ultimately sell to their customers; that in the processing of hogs by appellants said hogs are divided into

numerous and separate portions and products, including hams, sausage, bacons, lard, loins, hocks, feet, heads, shoulders, trimmings, casings, neck bones, tails, and many other portions; that some of said products are pickled and others are smoked and yet others of which go through sundry other processes, and some are sold as fresh meat.

That after the slaughter of said hogs portions of the carcass of said hog are usually converted into sausage by the use of pork trimmings and, in the instance of a shortage of trimmings, by the use of other portions of varying values of such carcass, to wit, such as shoulders; that it is usual and customary for the meat packer to manufacture sausage made wholly from pork products and also to manufacture sausage made proportionately from pork products and other meat ingredients; that in the manufacture of sausage which is made only from a portion of pork products it is necessary for the packer to and he does utilize other meat products which are wholly free from tax as imposed under said Agricultural Adjustment Act; that the packer from time to time varies, to an extent, the formulae of mixed pork products as depending upon the availability of the meat ingredients.

That for the foregoing reasons and further reasons hereinafter averred and set forth, it would be and is, from an accounting standpoint, impossible to allocate the proportional part of said processing tax so levied on the live weight of the hog before processing to each of said portions and products thereof after processing; and it is impossible, from an accounting standpoint, to earmark and follow the different products of each hog after processing or to show and establish the cost of each of said various products therefrom or the sale price thereof, for the reason that said various portions of many hogs so processed

are of necessity in the meat packing industry co-mingled and stored together until the sale of some portion of such co-mingled products is available and, therefore, different products aforesaid are necessarily marketed at different times and under different marketing conditions and at greatly varied prices, and because of all of which it is factually impossible to determine the sale price of the products of any one dressed hog as a whole.

Affiant further avers that appellants sell the products processed from hogs on the open market and in competition with other processors over the State of California, as well as in competition with other processors, who ship into and sell in said state like pork products; that in the sale of such products so processed by said packers the same are also sold on the open market and in competition with other meat products and substitutes which are wholly tax free under the terms of said Agricultural Adjustment Act; that affiant is informed and believes and therefore avers that in the sale of such products the appellants have not and do not add or include the processing tax as a separate item on their invoices; that as a practical accounting matter appellants would be precluded from doing so by their inability accurately to allocate any particular part or portion of the said tax to any particular product or quantity thereof, and that in this connection affiant is informed and believes and upon such information and belief avers that should appellants, or any of them, so attempt to allocate any particular part of said tax and do so inaccurately or make misstatements in that regard appellants' so doing would be subject to the heavy penalties imposed by Section 20 of said Act as amended.

Affiant is informed and believes and upon such information and belief alleges that due to economic and com-

petitive conditions prevailing from time to time in the markets in which appellants buy hogs and sell the products therefrom, and due to the perishable character of appellants' products, by reason of which they are upon occasion forced to make immediate and disadvantageous sales, they sometimes sell their said products at a loss and sometimes at a profit and will necessarily continue to do so; that said Section 21 (d) does not provide whether the price received by the appellants upon the sale of one of their products is to be allocated first, to the full reimbursement of the processing tax payable by appellants, or first to the full reimbursement to appellants of their costs other than said taxes, or prorated to all of appellants' costs.

That because of the foregoing and all other averments in this affidavit contained affiant avers that from an accounting standpoint it would be absolutely impossible to establish in the case of any particular portion or quantity of said pork products whether the tax with respect thereto was or was not passed on by appellants to their customers, and in particular as a matter of accounting it would be impossible to establish that any definite and ascertainable part of such tax was or was not so passed on; that in this connection affiant avers that the assumption that a particular pork product, or any specified quantity thereof bears any particular part of the tax is wholly arbitrary and is not susceptible of proof by any system of accounting.

Affiant is informed by counsel and believes and therefore avers that in order to recover any processing taxes, if hereafter paid by appellants, appellants will be required to show under the said Section 21 (d) of said Act, as amended, that the price paid by them for the hogs processed by them was not reduced by the amount of such processing tax; appellants in the past have paid and neces-

sarily will pay for their purchases the competitive open market prices in effect at the time of each purchase; the market price of such commodity is, has been and will continue to be a fluctuating price depending upon market conditions in respect of supply, demand, cost of production, freight rates, competition and other factors prevailing from time to time.

Affiant avers that the processing tax payable by appellants with respect to any hogs which they buy is only one of many factors affecting the market price of such commodity at any given time; the effect of such single processing tax factor upon the market price of hogs as an accounting matter can at no time be isolated and determined and it is therefore affiant's opinion that it is not possible for the appellants to show, in respect of any purchase, whether, or to what extent, the market price thereof was affected by said tax.

Affiant further avers that it is his opinion, based upon his said certificate as a Certified Public Accountant and his qualifications and experience as herein averred and set forth, that the fact of such passing on of said tax to the vendee or passing back of said tax to the vendor, as an accounting matter, is impossible to determine and that any attempt to so determine the same would result in speculation and conjecture.

Further affiant saith not.

Ralph V. Hunt

Subscribed and sworn to before me this 23rd day of September, 1935.

Mary F. Redding

Notary Public in and for the City and County of San Francisco, State of California.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant,
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STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

GEORGE KERR, being first duly sworn deposes and says:

That he is the office manager of the Los Angeles plant of ARMOUR & COMPANY, a New Jersey corporation now operating a pork packing plant in the city of Los Angeles, state of California, under lease from Hauser Packing Company. That he has been connected with the pork packing industry for a period of twenty years last past and during said twenty year period he has become familiar with the accounting methods used in pork packing plants and particularly by Armour & Company. That during said period he has also become acquainted with the manner and method of processing hogs.

That subsequent to the purchase of a hog by the processor, and just before slaughtering, the hog is weighed in order to establish the processing tax liability of the processor under the Agricultural Adjustment Act. After the hog is slaughtered the carcass is processed into more than fifty separate and distinct products and by-products, including those listed on page 12 of the petition filed herein by Armour & Company.

Affiant further states that the price paid for hogs on the hoof is a fluctuating price, varying from hour to hour as well as from day to day. Furthermore, it is usual that the ultimate character of some of the products may be changed prior to their final completion, such as the conversion of trimmings and some times cuts, into sausage,

and in the manufacture of such sausage other ingredients in varying proportions are often added.

That after the hog has been processed into various products and by-products and said products have been processed to the extent that the processor finds necessary or advisable, such products are sold in an open and competitive market, usually covering a period of 10 days to 6 months after the slaughter, and the price received therefor depends upon the market price on the day on which said products are sold, and such products are sold not only in competition with other pork products but with other meat products of many different kinds and with other food products and meat substitutes, all of which products have a varying degree of perishability, which materially affects the price on any given date. Hence, the sales price received for such products may have no actual relation to the cost thereof to the processor.

No accounting system of the packing industry with which affiant is familiar is so established that it is now possible to prove as to taxes which became due and payable before the Act was amended that such taxes were not passed on to the public, for the reason that no system of identification of the particular articles processed from any particular hog carcass has been established or can be established. Consequently, all articles which were processed from hogs killed before the effective date of the amendments are now intermingled and confused and that such products can not be traced back to the carcass from which processed; hence, it can not be proven that any such individual article was sold for more or less than its in-

dividual cost as a part of the carcass from which it was taken. That there is not now in existence any operating procedure or accounting system used by the pork packing business of which affiant is aware by which such allocation of the finished product to the carcass of the hog from which it was taken could be made.

Further, in affiant's opinion, it would be impossible to establish an operating procedure that would identify each and every product processed from a given hog carcass to the end that same might be accounted for subsequently at the time of sale of each and every one of those products.

Further affiant saith not.

George Kerr

Subscribed and sworn to before me this 23rd day of September, 1935.

Mary F Redding

Notary Public in and for the State and City and County aforesaid.

My Commission expires July 1

(Seal)

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MERCHANTS PACKING COMPANY, a corporation, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7978
MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7979
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BRIEF OF APPELLANTS ON APPEAL FROM ORDERS DISSOLVING INJUNCTIONS.

(Continued on Inside Cover.)

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Circuit Court of Appeals
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CORNELIUS BROTHERS, LTD., a corporation, Appellant, vs. NAT ROGAN, etc., Appellee.	No. 7985

BRIEF OF APPELLANTS ON APPEAL FROM ORDERS DISSOLVING INJUNCTIONS.

STATEMENT OF THE CASE.

Appellants in the above-entitled causes have appealed to this Honorable Court from orders made by Honorable Paul J. McCormick, judge of the United States District Court for the Southern District of California, vacating temporary injunctions theretofore granted appellants in said causes, by the terms of which appellees were enjoined from collecting or attempting to collect processing taxes levied against appellants under an Act of Congress commonly known as the Agricultural Adjustment Act.

The orders appealed from in the case of each appellant herein are identical [Luer Rec. pp. 86, 90].

Plaintiffs are engaged in the meat packing business in Los Angeles county and were and are processors of hogs as defined by the Act. In the carrying on of their business, they engaged and are yet engaging in only intrastate business; and to no degree, either directly or indirectly, has their business of meat packing and processing of hogs at any time affected or interfered with or burdened interstate commerce.

The above actions were filed separately, and after the filing of the complaint in each case a restraining order was issued. After separate hearings and arguments in each case temporary injunctions were thereafter issued in each case by the judge before whom the case was pending in the District Court. Appellees motion to dissolve the injunction in each case was made before the Honorable Paul J. McCormick, one of the judges of the District Court. The motions were identical in each case, and were heard together and the court made separate orders identical in terms in each case, vacating the tem-

porary injunctions theretofore granted. Supplemental complaints were filed by each of the appellants and thereafter an appeal was perfected by appellants to this court upon separate records in each case. A petition was made by each appellant before this court for an order granting injunction or supersedeas pending appeal, which petitions were heard together and the prayers thereof granted by this court in a joint order. There is also a separate assignment of errors filed by each appellant, which assignments present substantially identical questions.

For the convenience of court and counsel, and since the matters involved in the above-entitled causes are similar, the above-named appellants are filing this joint brief as the brief of each of said appellants.

For convenience, we are sometimes referring hereinafter to the parties hereto as plaintiff and defendant, respectively, and by the term plaintiff shall mean all of the above-named appellants.

As indicated, the records in each case in the various appeals are substantially identical and it has not been deemed necessary to burden this brief with citations to the pages of the individual records, which, of course, are indexed according to documents which may be readily found by consulting the index.

The complaints are substantially similar and seek to have the court declare the Agricultural Adjustment Act unconstitutional and unenforceable and to grant an injunction against the defendant Collector of Internal Revenue for the Sixth District of California, restraining the collection of processing taxes under the terms

of the Agricultural Adjustment Act. It was alleged that the act under which the taxes were levied was unconstitutional for the reasons, among others, that the Act was violative of Article I, Section 8 of the Constitution; of the Tenth Amendment thereto; of the Fifth Amendment thereto; and of Article I, Section 8, Clause 3 of the Constitution; and as further reasons for injunctive relief, that appellants had and were given no plain, adequate, speedy and complete remedy at law; that a multiplicity of actions would ensue for the recovery of such illegal taxes paid, if they paid the same and they undertook to obtain a refund thereof; that the Act sought to regulate intrastate business and commerce; that they were engaged only in intrastate business; that they were unable to pass such tax on to the vendee or ultimate consumer, and would continue to be unable to do so; that to deny injunctive relief to them as prayed would result in irreparable loss and injury to them, resulting in the loss of their property and the good will of their said business; and that the penalties provided, both civil and criminal, in the event appellants refuse to pay the processing taxes, were in nature and effect so excessive, harsh and oppressive as to amount to a complete denial of a remedy and to cause irreparable injury to appellants. As a further reason for the granting of such injunctive relief, it was also alleged therein that there was then pending in the Congress of the United States certain proposed amendments to the Agricultural Adjustment Act which would have the effect of entirely preventing and defeating any legal

remedy appellants might otherwise have for the recovery of any taxes paid, in the event the Agricultural Adjustment Act should be declared unconstitutional.

A hog processor is unable to comply with the onerous conditions of the amendments to the Agricultural Adjustment Act because the facts required to be proved are incapable of ascertainment and the right of refund therein provided is purely illusory and does not constitute any remedy at law or any remedy whatsoever. [Tr. Armour & Co. v. Rogan, pp. 21-22.] None of the averments of the bills of complaint, of the supplemental bills, of the petitions or affidavits filed have ever been denied by the defendants either by answer herein, affidavit, or otherwise, because of which all of the allegations thereof have been, at all times since the filing thereof, in effect, admitted as true and are yet so admitted as being true.

By the terms of the temporary injunctions plaintiffs were required to furnish bond in specified amounts or to deposit cash with the clerk of the court in lieu thereof, securing the defendant for the amount of taxes, penalties and interest due, if it should be finally determined that such injunctions were improperly issued, which security was duly furnished, or cash in lieu thereof deposited with the clerk of the court.

The temporary injunctions granted in each case, with one or two exceptions, are identical in terms, except as to amounts and formal recitals, containing the following language:

> ". . . and after hearing counsel for the respective parties, and the matters having been submitted

to the court for its consideration; and it appearing to the court, and the court finds that it is true, that certain processing taxes are due and payable from plaintiff under the terms of the Agricultural Adjustment Act, hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act; that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition for the reason that there is immediate danger that said defendant, Nat Rogan, either individually or as Collector of Internal Revenue, will proceed under said Act to collect from said plaintiff said taxes, and in so doing will disstrain, levy upon and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing to plaintiff an irreparable loss of such property and the good will of plaintiff's business likewise mentioned in said bill of complaint and petition; and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy and adequate remedy at law in the premises; that if said restraining order is not so issued there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act; and that for all these reasons a preliminary restraining order should issue herein against defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, as prayed for in said bill of complaint and petition."

Thereafter, and subsequent to the decision of this court in the case of *Fisher Flouring Mills Co. v. Vierhus,* No. 7938, defendants filed in said District Court their motion to vacate said temporary injunctions. [Luer Rec. p. 83.] The motions were identical in all cases. The grounds of the motion were, in substance, stated as follows:

(1) The court was without jurisdiction to enjoin the collection of the taxes for the reason Section 3224 of the Revised Statutes precluded a suit for that purpose; that the bill of complaint did not state facts warranting such relief; and that complainant had a plain, adequate and complete remedy at law;

(2) That on the records, files and proceedings in the case plaintiff is not entitled to injunctive relief;

(3) That since the preliminary injunctions were granted the alleged grounds upon which the same were granted were no longer in existence for the reason, as stated, that the Congress, in its enacted amendments to the Act, did not deny the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives and the basis upon which the injunctions were herein granted. (Note: Judge James, in his minute order granting temporary injunction in the Luer case [Luer Rec. p. 75] in effect excluded from consideration this matter [see last lines, p. 76 of Rec.]. And the other judges, in their orders granting the temporary injunctions, did not base their decisions upon this ground);

(4) That appellants were guilty of laches for the reason they paid the taxes for many months prior to the filing of their suits, etc.; and

(5) That since the preliminary injunctions were entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in appellants' bills of complaint, and that such decision of the said Circuit Court is binding on this District Court, so that it is improper for this court to allow said temporary injunctions to remain in force and effect.

The judges of the District Court who granted the respective temporary injunctions in these cases, being absent on vacation, the said motions to vacate the injunctions were noticed before and were heard by Judge McCormick of that court. The motions were granted by him on August 30, 1935. The sole ground for the action of the court on this behalf is stated in the order of the court in this language:

> "An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in *Fisher Flouring Mills Co. v. Collector, etc.,* decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in the court from the denial of injunctions by a District Court in the state of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.
>
> "No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the circuit judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

> "Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and *such authoritative control requires the granting of the motion* to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." (Italics ours.)

By order of the District Court leave was granted plaintiffs to file herein supplements to their respective bills of complaint, and thereafter petitions for rehearing were heard and denied.

The supplemental bills of complaint were filed in each action, which set forth in great detail the particulars on which the remedies provided by the amendment to the Agricultural Adjustment Act were inadequate and facts showing that the conditions imposed by the amendments were so burdensome that it would be impossible for plaintiff to comply therewith. The petition of plaintiffs for an appeal to this court from the order vacating the temporary injunctions was allowed. The appeals have been perfected in each case, and are now pending herein.

Thereafter appellants filed in this court petitions for supersedeas and injunctions pending appeal and on September 24, 1935, after oral argument, this court granted the petition and issued a supersedeas and injunction pending appeal. In that connection, the order of this court required that these appellants either furnish security to said Collector by way of corporate surety to be approved by said District Court, or deposit cash with the clerk of that court equal to all taxes, penalties and interest

due and to become due from appellants to said Collector under the terms of said Agricultural Adjustment Act and the Act as amended, and for which no security, or cash deposit, has heretofore been given or made by appellants under order of court herein; and said appellants respectively have fully carried out the said order, in that they have filed with the clerk of said District Court and had approved by such court undertakings of a surety corporation securing to said Collector the payment of all taxes, penalties and interest due from appellants to date.

The assignments of errors of appellants upon which appellants rely in this appeal are, in substance, as follows:

Specifications of Errors Relied Upon by Appellants.

1. The District Court erred in granting the motion vacating the temporary injunction.

2. The District Court erred in vacating the temporary injunction for the reason that its order was made inadvertently under the mistaken belief that the decision of this court theretofore rendered in the *Fisher Flouring Mills* cases required the court to make such order.

3. The District Court erred in vacating said temporary injunction for the reason that such order will have the effect of preventing appellant from obtaining a trial of the cause on its merits, and will cause irreparable damage and loss to appellant, whereas the continuing

in force of said temporary injunction under its terms will not harm appellee.

4. The court erred in vacating said temporary injunction for the reason that the issues presented by this case are such as to require, for the proper disposition of the case, a hearing by the court, and decision of the issues of fact upon which appellant's right to relief is based.

5. The court erred in dissolving said temporary injunction because the circumstances and conditions which were set forth in plaintiff's complaint, and not contradicted by the record in said cause, and which allegations were found by the court to be true, and which necessitated the granting of the temporary injunction, continued in existence at the time of the said order dissolving the said injunction.

6. The court erred in dissolving said temporary injunction because since the passage by Congress of the amendments to the Act, which occurred subsequent to the decision of the Circuit Court of Appeals in the said case of *Fisher Flouring Mills Company, a corporation, vs. Alex McK. Vierhus, etc.,* any remedy at law that plaintiff has heretofore possessed has been rendered so cumbersome, capricious, uncertain, unwieldy, and impossible of proof as to deprive the plaintiff of any and all remedy at law.

7. The court erred in dissolving said temporary injunction because the order dissolving the temporary

injunction heretofore granted to the plaintiff herein will, in effect, result in taking the property of the plaintiff without due process of law, in that, after taking the property of the plaintiff in satisfaction of the taxes assessed and levied under said Agricultural Adjustment Act, as amended, the remedies provided to the plaintiff, and which plaintiff would be compelled to pursue, where injunctive relief is denied to it, are so cumbersome, costly and limited and uncertain as to amount to a denial of any relief to it.

8. The court erred in vacating said temporary injunction for the reason that unless said temporary injunction is permitted to remain in force, appellant will be required to engage in a multiplicity of suits from which equity should afford relief.

9. The court erred in vacating said temporary injunction for the reason that there was no showing that the maintenance of said action was prohibited by the provisions of Section 3224 of the Revised Statutes.

10. The court erred in vacating said temporary injunction for the reason that there was no showing that plaintiff was guilty of laches in the institution of said action.

Appellants rely upon each and every of their respective assignments of error, as each assignment is germane to the issues set out in the specifications of error here relied upon.

BRIEF OF THE ARGUMENT.

I.

If the Trial Court Inadvertently Made the Orders Appealed From Under a Mistaken Belief That the Decision of This Court Theretofore Rendered in the Fisher Flouring Mills Cases Required the Granting of Such Order, Then Upon Suggestion to This Court of the Fact of Such Inadvertence and Mistake the Orders Should Be Reversed.

The temporary injunction was vacated by the trial court, not upon any showing of any change in the circumstances, but solely upon the ground that the decision of this court in *Fisher Flouring Mills Co. v. Vierhus,* rendered August 15, 1935, required the trial court to refrain from exercising its independent judgment and to vacate the injunction. In this the trial court was in error, for the reason that the *Fisher Flouring Mills* case was based upon different facts and was decided under the law as it stood prior to August 24, 1935, at which time a claim for refund was not subject to the restrictions and limitations of the amendments to the Act of that date.

II.

The Temporary Injunction Having Been Granted After a Full Hearing and Upon a Showing of Circumstances Found to Justify Granting Equitable Relief to Plaintiff, Which Facts Have Not Been Controverted by Defendant in Any Manner, and Defendant Not Having Shown Any Change in Circumstances or Conditions Necessitating the Vacating of Said Temporary Injunction, the Court Was Not Justified in Granting Defendant's Motion.

III.

The Continuance in Force of the Injunctions Until the Trial of the Causes on Their Merits Will Not Harm the Appellees, for the Reason They Are, by Deposits of Money and Undertakings Made by Appellants Under Order of Court, Fully Secured in the Payment of the Taxes if Such Taxes Are Finally Declared Valid; Whereas, a Lack of Such Injunction Will Cause Irreparable Damage and Loss to Appellants.

Failure to preserve the *status quo* pending trial would result in irremedial injury to plaintiff, and in view of the fact that the questions presented involve matters of great importance, an injunction should be granted pending the trial of the case.

28 *U. S. C. A.,* Sec. 377;

Foster etc. v. Haydel, 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154;

Cotting v. Kansas City Stock Yards Co. (C. C. Kan.), 82 Fed. 850, 857;

City of Pasadena v. Superior Court, 157 Cal. 781, 790, 795.

IV.

The Temporary Injunctions Should Be Continued in Force Until the Decision on the Merits of the Cases Becomes Final; for Only in and by the Final Disposition of the Cases on Their Merits, Can There Be Determined the Important and Controlling Questions of Law and Fact Upon Which Depend the Right of Appellants to the Relief Prayed For.

The issues presented by this appeal which involve legislation which is of doubtful validity and uncertain construction, and requires the determination of the facts as to the operation of such legislation on plaintiff's business, cannot properly be determined upon a summary hearing, but only after a full trial.

Borden Farm Products Co. v. Baldwin, 293 U. S. 194.

V.

The Temporary Injunction Should Be Continued in Effect for the Reason That Plaintiff Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

A. The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly* include the amount of the claim in the price of the article or pass on *"any part* of such amount to the vendee or to any other person in *any manner"* or include *"any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amount." Sec. 21(d) (1).

Southern Pac. Co. v. Darnell Taenzen Lmbr. Co., 245 U. S. 541, 62 L. Ed. 451, 455;

International Harvester Co. v. Kentucky, 234 U. S. 216, 222, 223, 58 L. Ed. 1284;

Lash's Products Co. v. United States, 278 U. S. 175, 73 L. Ed. 251.

(a) The fact that under the amendments there is no accurate method for computing plaintiff's damage, and that the amount cannot be adequately proved, in itself requires equitable relief against the exaction of illegal levies.

32 *C. J.*, p. 62, Sec. 40;

Texas Company v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1;

Marquette Cement Mining Co. v. Oglesby Coal Co., 253 Fed. 107, 117.

(b) A court of equity is not deprived of jurisdiction to grant injunctive relief where the remedy at law is not equally plain, speedy, complete or practical, and as efficient to obtain the ends of justice both in respect to the final relief sought, and the mode of obtaining it, as is the relief in equity.

Cable v. U. S. Life Ins. Co., 191 U. S. 288, 303, 48 L. Ed. 188;

Standard Oil Co. v. Atlantic Coast Line R. Co. (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637; aff. 275 U. S. 257; 72 L. Ed. 270;

Clark v. Pigeon River Improvement etc. Co. (C. C. A. 8), 52 Fed. (2d) 550, 557;

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2d) 269, 271;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 116;

Magruder v. Belle Fourche Valley Water User's Ass'n (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21(d) (1).

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14, 16, 68 L. Ed. 878.

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21(d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe." Sec. 21(d) (2).

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823.

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the commissioner renders a decision within that time." Sec. 21(d) (2).

VI.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which It Is in the Power of Equity to Grant Relief.

Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380;

Postal Cable Telegraph Co. v. Cumberland T. and T. Co., 177 Fed. 726;

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co. (Okla.), 111 Pac. 326;

Texas Co. v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1.

VII.

Section 3224 of the Revised Statutes Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

Miller v. Standard Nut Margarine Co., 284 U. S. 498, 76 L. Ed. 422;

Skagit County v. Northern Pac. Ry. Co., 61 Fed. (2) 638 (C. C. A. 9);

Hopkins v. Southern Cal. Telephone Co., 275 U. S. 393, 72 L. Ed. 329;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 37, 39, 52 L. Ed. 90;

Wallace v. Hines, 253 U. S. 66, 67, 64 L. Ed. 782;

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 286, 62 L. Ed. 1110;

Atlantic Coast Line Ry. v. Daughton, 262 U. S. 413, 67 L. Ed. 1051;

Wilson v. Illinois Southern Railroad Co., 263 U. S. 574, 576, 68 L. Ed. 456;

Hill v. Wallace, 259 U. S. 462, 66 L. Ed. 822.

VIII.

Section 21(a) of the Amended Act Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

(1) Section 21(a) was not made a ground of defendant's motion to vacate the temporary injunction and was not referred to therein.

Alaska Salmon Co. v. Territory of Alaska (C. C. A. 9), 236 Fed. 62, 63;

Van Norden v. Chas. R. McCormick Lumber Co. (C. C. A. 9), 17 Fed. (2) 568;

Hercules Powder Co. v. Rich (C. C. A. 8), 3 Fed. (2) 12.

(2) The provisions of Section 21(a) do not by their terms purport to apply to taxes imposed before the date of the adoption of the amendment.

(3) Section 21(a) should not be construed, even as to future taxes, as an absolute bar to equitable relief.

(a) Section 21(a) should be construed as a reenactment of Section 3224 of the Revised Statutes.

Heald v. District of Columbia, 254 U. S. 20, 65 L. Ed. 106;

Lattimer v. U. S., 223 U. S. 501, 56 L. Ed. 526.

(b) Section 21(a) is not to be extended beyond its express terms and is to be construed in favor of the plaintiff.

Hecht v. Malley, 265 U. S. 144, 68 L. Ed. 949;

Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211.

(c) Section 21(a) constituting a part of a legislative enactment which was presumably considered an adequate legal remedy, is not applicable where the legal remedy turns out to be inadequate.

(d) Section 21(a), in the absence of specific language to the contrary, will not bar a suit where the legal remedy is inadequate.

Miller v. Standard Nut Margarine Co., 284 U. S. 498, 76 L. Ed. 422.

(e) The terms of Section 21(a), which do not purport to take away jurisdiction from the courts in the light of congressional debate thereon, indicate that there was no intent to impair equity jurisdiction.

Fox v. Standard Oil Co., 294 U. S. 87, 79 L. Ed. Adv. Sh. 339.

(f) Section 21(a), being applicable by its terms both to state and federal courts, should not be construed as an absolute prohibition of injunctive relief.

(g) Section 21(a) must be construed in the same manner as Section 3224, and subject to the same exceptions, and applied only where the legal remedy is adequate, otherwise the Fifth Amendment is violated.

Graham & Foster v. Goodcell, 282 U. S. 409, 75 L. Ed. 415;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107;

Lipke v. Leiderer, 259 U. S. 557, 559, 562, 66 L. Ed. 1061, 1064;

Phillips v. Commissioner, 283 U. S. 589, 596, 75 L. Ed. 1289;

Regal Drug Corp. v. Wardell, 260 U. S. 386, 391, 67 L. Ed. 318;

Ettor v. Tacoma, 228 U. S. 148, 57 L. Ed. 773;

Gold Medal Foods, Inc., v. Landy (D. C. Minn.), decided October 22, 1935;

A. P. W. Paper Company, Inc., v. Riley (D. C. N. Y.), decided October 18, 1935;

Panama Railroad Co. v. Johnson, 264 U. S. 375, 390, 68 L. Ed. 748, 754.

IX.

There Was No Showing That Plaintiffs Were Barred by Laches.

ARGUMENT.

I.

If the Trial Court Inadvertently Made the Orders Appealed From Under a Mistaken Belief That the Decision of This Court Theretofore Rendered in the Fisher Flouring Mills Cases Required the Granting of Such Order, Then Upon Suggestion to This Court of the Fact of Such Inadvertence and Mistake the Orders Should Be Reversed.

In approaching the discussion under this heading we are not unmindful of the general rule that on an appeal it is the judgment or order of the trial court, as the case may be, which the appellate court reviews and not the opinion or reason given by the trial court for such judgment or order. Here, however, the court's order shows that the court declined to exercise its discretion.

It is to be remembered that by paragraph V of the motion to vacate the injunctions the ground thereunder relied upon for the dissolution of the injunctions was that since this court in the *Fisher Flouring Mills* cases had denied an injunction in cases based on similar causes of action to that of the instant cases, it was improper for the trial court to allow the temporary injunctions to remain in force.

Whether the statements contained in the orders are findings or reasons, they are so inextricably woven into the orders that the validity of these orders cannot be discussed or considered without likewise discussing and considering these statements given for having made the orders.

The language of the orders vacating the injunctions very clearly exposes the foundational circumstances upon which the trial court based its orders.

> "An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in *Fisher Flouring Mills Co. v. Collector,* etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.
>
> "No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.
>
> "Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and *such authoritative control requires the granting of the motion* to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." (Italics ours.)

That the trial court was under the definite impression that the decision in *Fisher Flouring Mills v. Vierhus* precluded it from exercising any discretion in connection with the question of plaintiff's right to injunctive relief in this case, is also clearly indicated by the order which it made

upon allowance of the appeal in this matter, in which it was directed that any application for injunctive relief be presented to the Ninth Circuit Court of Appeals. The portion of this order to which we refer was set out in the opinion heretofore rendered, and is as follows:

> "That, *in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit* in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this court that any relief in the form of supersedeas, whereby the temporary injunction heretofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, should be pursued by the plaintiff in the form of an application for an injunction pending appeal to be presented to said United States Circuit Court of Appeals for the Ninth Circuit if the plaintiff wishes to secure such relief." [Armour & Co., Tr. pp. 96-97.] (Italics ours.)

It is, therefore, submitted that the second specification of error, to-wit:

> "2. The District Court erred in vacating the temporary injunction for the reason that its order was made inadvertently under the mistaken belief that the decision of this court theretofore rendered in the Fisher Flouring Mills cases required the court to make such order."

is well taken.

The refusal of the trial court to exercise its judicial discretion cannot be more clearly shown in any case than by the court's own statement of the grounds for its order.

The trial court definitely and succinctly defined the only matters considered by it in passing on the motion of appellees for the orders made; and beyond doubt, the court would not have dissolved the injunctions but for its erroneous conception of the mandatory nature of the decision of this court in the *Fisher Flouring Mills* cases. That the trial court was laboring under a misapprehension and because thereof inadvertently made the orders vacating the injunctions, is likewise beyond doubt.

This court in its opinion herein has expressly held that the facts involved in the two groups of cases were dissimilar. To quote:

> "In those cases the trial court had denied an injunction and an application was made to this court for such an injunction pending the appeal. The situation is changed by amendment to the law affecting the remedy of a taxpayer to recover an invalid tax. The facts alleged also are different from those involved in the Fisher Flouring Mills cases."]

The decision of this court in the *Fisher Flouring Mills* cases did not become controlling, and should not, to any degree, have controlled, in the matter of the dissolution of the temporary injunctions in the instant cases.

The court did not make its orders dissolving the injunctions on all grounds generally, nor on the grounds mentioned in the motion other than the fifth ground. The temporary injunctions had originally been granted by the same court, but by different judges of that court, upon a showing of facts deemed amply sufficient to warrant the order granting them. Between the time of the issuance of such injunctions and the hearing on the motions to vacate them, there were no changes in the facts and circum-

stances of the cases noted by the trial court excepting the *Fisher* decision. Then how can any other grounds be reasonably ascribed for the orders than the one ground stated in the order itself?

The trial court thus having been led into error through a misconstruction of the opinion of this court in the *Fisher Flouring Mills* cases, and having because of that mistake inadvertently vacated the injunctions herein, the appeals should prevail.

It is clear that in the present case the court definitely refused to exercise any discretion in passing upon the issues presented by the motion. *No clearer showing could ever be made in any case, as to such refusal.*

Even if it could be said that the court had in fact exercised its discretion in the matter, it has been held by this court that a ruling vacating an injunction is not binding on appeal in the same sense as an order granting or denying a temporary injunction. The latter is regarded as discretionary to some extent; but upon a review of an order dissolving an injunction the appellate court is required to indulge the presumption that the original order granting the temporary injunction is valid and proper, and that that in itself furnishes a *prima facie* case for the continuance of the *status quo* pending the trial.

In the case of *Bathwell v. Fitzgerald, et al.,* 219 Fed. 408 (C. C. A. 9), this court said:

> "This brings us to the consideration of the only question involved in this appeal: Was the lower court right in dissolving the interlocutory injunction? The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discre-

> tion of the trial court, and the review thereof by an appellate court is limited to the inquiry whether there was an abuse of discretion in granting the writ, is based largely upon the consideration that the object and purpose of the preliminary injunction is to preserve the existing state of things until the right of the parties can be fairly and fully investigated and determined upon strictly legal proofs according to the course and principles of equity. . . But no such consideration obtains where the trial court dissolves a preliminary injunction. *The granting of an injunction to preserve the status quo may be a substantial and persuasive reason for continuing it in force.* It follows that when a preliminary injunction has been dissolved, the appellate court will not be limited to the question whether the trial court has abused its discretion in dissolving the injunction, *but may inquire into all of the circumstances connected with the proceedings as they appear of record, and the effect the dissolution of the injunction may have on the rights of the parties.*"

The reasons for this rule are peculiarly applicable to the present case where the trial courts, after full hearing and extended arguments, have determined that the temporary injunction is proper and have entered their orders providing for the preservation of the *status quo* pending the trial and safeguarding the rights of all parties; and defendant did not, upon the motion to dissolve such temporary injunction, make any showing whatsoever or attempt to make any showing of any change of circumstances other than to call the trial court's attention to the decision of this court in the *Fisher Flouring Mills Company* case.

II.

The Temporary Injunction Having Been Granted After a Full Hearing and Upon a Showing of Circumstances Found to Justify Granting Equitable Relief to Plaintiff, Which Facts Have Not Been Controverted by Defendant in Any Manner, and Defendant Not Having Shown Any Change in Circumstances or Conditions Necessitating the Vacating of Said Temporary Injunction, the Court Was Not Justified in Granting Defendant's Motion.

The showing made by plaintiff in its complaint, supplemental complaint, petition for injunction pending appeal and in the affidavits filed herein, of the circumstances entitling plaintiff to equitable relief have not been controverted in any manner by the defendant, and stand admitted in the record in this case. The trial court found that the circumstances set forth entitled plaintiff to the relief prayed for. In the order of Judge James in the *Luer Packing Co.* case, it was stated that

> ". . . there is grave doubt as to the constitutionality of the Act. . . . The court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an injunction, exclusive of any consideration of the fact that Congressional action is threatened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the court can give small weight because of its speculative and conjectural character."

This minute order was adopted in the opinion of the other judges granting the motion for temporary injunction. No appeal has been taken by the Government from the order denying the motion to dismiss, and defendants from time to time have obtained extensions of time to plead to the bills of complaint.

The motion to vacate was not accompanied by any affidavits or any showing of any change of circumstances, or any showing of fact whatsoever.

III.

The Continuance in Force of the Injunctions Until the Trial of the Causes on Their Merits Will Not Harm the Appellees, for the Reason They Are, by Deposits of Money and Undertakings Made by Appellants Under Order of Court, Fully Secured in the Payment of the Taxes if Such Taxes Are Finally Declared Valid; Whereas, a Lack of Such Injunction Will Cause Irreparable Damage and Loss to Appellants.

In its order granting the temporary injunctions the trial court in each case, made an order providing for the giving by plaintiff of an approved surety bond or in lieu thereof deposits of sums of money with the clerk of the United States District Court in amounts sufficient to secure the collector the payment of the processing taxes owing by the plaintiff under the terms of the Agricultural Adjustment Act, together with penalties, interest and costs, in the event it should be finally decided that the injunction was improperly issued or the action should be dismissed. Each of the appellants has deposited with the clerk of the court the respective sums of money required or has furnished a corporate surety bond approved by the court in the required amounts.

Upon granting the *supersedeas* and injunctions on appeal herein, this court required that appellants each should cause to be executed and filed in said District Court a bond of a corporate surety approved by said court in an amount equal to the unpaid amount of taxes, penalties and interest then due and for which security had not theretofore been given, and for the taxes, penalties, and interest each month thereafter becoming due under the Agricultural Adjustment Act; and appellants respectively have executed and filed with said clerk a duly

approved undertaking as required by the order, and will as and when further processing taxes become due from them under the terms of the Act furnish in a like manner the security required.

Thus, it will be observed that, if it should finally be determined that the Agricultural Adjustment Act and the Act as amended are constitutional and enforcible, the appellees will not be damaged in anywise by a continuance in force of the temporary injunctions until that event transpires. The possession of the money is deferred, but one may afford the withholding of money for a limited length of time if one receives 1% per month interest, to say nothing of an additional 5% of the principal added for the withholding. On the other hand, if the injunctions are not continued the appellants are faced with certain and irreparable loss. They may choose to pay the processing taxes at a ruinous loss to their business as alleged in their bills of complaint, without hope of securing a refund thereof if the tax be ultimately declared invalid, as herein more fully discussed; or they may refuse to pay the taxes now assessed and as they are from month to month assessed, and suffer the consequences of such non-payment. This consequence might be (1) distraint and sale of all the property and good will of appellants to the utter loss of all thereof to appellants, and (2) suffering by the officers and agents of the appellants the unusually severe and harsh penalties.

It must appear to this Court that the continuance of the injunctions in force will be of no real detriment to the appellee Collector, but will be of inestimable benefit to the appellants. This is not a case wherein appellants are seeking to avoid a tax for revenue purposes exacted under a statute already adjudicated to be, or which beyond

a doubt is, constitutional, like the income tax act at the present time, for example. It is questionable whether the Act and the amendments thereto are revenue measures at all, and whether the Act and the amendment are constitutional and enforcible. The law is a new departure in taxation based on novel and unprecedented lines, the experience under which according to the allegations of the bills of complaint herein has brought about a situation of exceptional and unusual hardship to the appellants by reason of their prior compliance with the law and will result in extraordinary loss and irreparable damage unless the enforcement of the law is enjoined until the merits of the cases may be tried and determined, or until the Supreme Court of the United States declares itself upon the important questions involved.

The equities of these appellants are in no wise diminished because the United States Government happens to be interested in the litigation. Equity delights in equality. Furthermore, as we have pointed out the appellants are doing equity by giving, and offering to continue to give, complete security for the ultimate payment to the Collector of the processing taxes, if finally held to be valid. The appellants will continue to furnish to the Collector ample security for the payment of said processing taxes, becoming due from month to month, and the interest and all costs assessed against them, if it be finally decided by judicial decree that the taxes are valid and enforcible. The rights of the appellees being thus safeguarded in all respects, it must be admitted that no harm can be suffered by them by reason of an order of this court preserving the *status quo* of these cases pending final determination of the questions involved.

The questions now presented to this court are not now upon final hearing, but are presented at a stage in the pro-

ceedings where temporary relief alone is sought. The merits of the cases cannot be considered or determined at this time, nor in this proceeding. In the meantime, however, the appellants and their property rights should be protected by this court through injunctive relief according to the rules and practice of equity, such relief being made imperative by the circumstances and exigencies affecting appellants' cases.

Judge Lindley in the case of *Kingan & Company v. Smith, Collector* (D. C. Ind.), in an opinion denying a motion to dismiss the bill of complaint, said:

> "Unfortunately there can be no authoritative determination of the constitutional questions involved until the Supreme Court shall have made its adjudication thereof. * * * the final decision lies with the Supreme Court. It is hardly consistent with equity to permit, during the interim awaiting final adjudication, collection of taxes, attacked for illegality without assurance of a remedy for reimbursement. Rather it seems that the court should protect both the sovereign government, and the subject by preservation of the existing status until final adjudication.
>
> "I have made it a condition to the temporary injunction issued that all taxes accruing from time to time shall be paid into court by the taxpayer and deposited subject to the order of the court. If it later be determined that the tax is proper, the government will receive all the same without deduction, expense or delay, and without any impediment to its administrative functions. Thus, it seems to me, equity is done both parties with injury to neither."

A denial by this court of this appeal from the order vacating the temporary injunction would have the effect

of precluding any further prosecution of this cause. The collector will proceed to enforce payment of the tax involved, so that the action will become moot. It will be impossible for plaintiff to obtain in this or any other proceeding a decision on the merits of the questions presented by the complaint.

In *Foster, etc. v. Haydel,* 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154, the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. (Citing cases.) The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremedial loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

In *Cotting v. Kansas City Stock Yards Co.* (C. C. Kan.), 82 Fed. 850, 857, the opinion was by Justice Thayer. A suit to enjoin the enforcement of a state statute fixing minimum charges was dismissed but an injunction pending appeal was allowed, the court saying:

> "The great importance of the questions involved in these cases will doubtless occasion an appeal to

the supreme court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance, by the Supreme Court in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the questions at issue *so balanced with doubt as to justify and require* an exercise of the power in question." (Italics ours unless otherwise noted.)

As stated in *City of Pasadena v. Superior Court,* 157 Cal. 781, 790, 795:

"In *Polini v. Gray,* L. R. 12 Chan. Div., 438, it is said by the master of the rolls: 'It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruit of that litigation and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of the first instance before the first trial, and to the court of appeals before the second trial, as to the court of last instance before the hearing of the final appeal.'"

IV.

The Temporary Injunctions Should Be Continued in Force Until the Decision on the Merits of the Cases Becomes Final; for Only in and by the Final Disposition of the Cases on Their Merits, Can There Be Determined the Important and Controlling Questions of Law and Fact, upon Which Depend the Right of Appellants to the Relief Prayed For.

As pointed out in the opinion of the court heretofore rendered on the application for injunction pending appeal, the questions involved are important questions of constitutional law and construction of statutes, and the question of fact as to whether in actual operation the statutory remedy is adequate or involves a multiplicity of actions.

The case involves not only the fundamental validity of the tax but the question as to plaintiff's right to resort to injunctive relief, and the construction of novel legislative acts which have not yet been passed upon authoritatively either as to their constitutionality or proper construction. It has been held that such important questions as are here presented should not be decided upon the pleadings, but only after a hearing on the merits.

In *Borden Farm Products Co., Inc. v. Baldwin,* 293 U. S. 194, the Supreme Court reversed the action of the District Court in disposing, upon a motion to dismiss, of

a bill to enjoin the enforcement of the New York Milk Control law. The trial judge had considered the decision of the Supreme Court in *Nebbia v. New York*, 291 U. S. 502, holding certain sections of the act unconstitutional, as conclusive of the question before him, and accordingly dismissed the bill without taking testimony. The case was remanded with instructions to proceed to final hearing and determination of the facts involved. The court in a special concurring opinion by Mr. Justice Stone, and Mr. Justice Cardoza, said:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

V. TRIAL

The Temporary Injunction Pending ~~Appeal~~ Should Be Continued in Effect for the Reason That Plaintiff Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

A. The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) *The Requirement That the Claimant Must Establish to the Satisfaction of the Commissioner of Internal Revenue That Claimant Did Not Directly or Indirectly Include the Amount of the Claim in the Price of the Article or Pass on "Any Part of Such Amount to the Vendee or to Any Other Person in Any Manner" in Effect, Deprives Plaintiff of All Remedy at Law.*

This result is not due to any fault of plaintiff, but arises from the fact that there is no criterion for the determination of the indirect incidence of the tax. The factors involved in the determination of this question can only be presented by a month by month showing of the circumstances of each purchase and each sale in the course of plaintiff's business, and when these factors have been established, the question of the extent to which each has influenced the price is necessarily speculative.

As pointed out in the complaint [Armour, Tr. pp. 21, 22] in the supplemental complaints and in the petitions filed herein, plaintiff is unable to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture together with the amount of the proc-

essing tax. More than 50 separate products result from the processing of a hog, and because of the nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for plaintiff or any one else to ascertain what portion of the processing tax payable upon the processing of the hog is assignable to the products resulting therefrom. The showing made by plaintiff in this regard has not been contraverted in any manner at any stage of these proceedings.

It is impossible to segregate the item of processing taxes and determine to what extent, if any, the sales price of pork products is affected by said tax. The tax is paid on the live weight of the hog. Immediately upon such processing the hog is converted into numerous different articles, each of which is affected by separate and distinct market trends and conditions, and subject to continual fluctuations over periods of time, varying in length with each article, but running from a period of a few days to several months. Upon conversion into such articles the commodity loses its identity. The prices obtained by plaintiff on the sale of the articles or products are determined by competition in the open market with the products of other packers and also with other food products. These prices fluctuate daily and over a wide range. The determination of the extent to which the purchase price obtained by plaintiff might constitute or be properly held to constitute a portion of the processing tax theretofore paid by plaintiff would involve the consideration of factors which it is impossible for plaintiff to establish by proof, even though plaintiff keeps the most accurate and complete records possible.

Prices of hogs are peculiarly sensitive to and reflect instantly supply and demand. When hogs are sent to

market they must be sold, and if a large supply is sent to a particular market on a given day, or during a given period, the price for hogs drops. If the price increases, farmers send more hogs to market—fewer if the price decreases. On the other hand, demand is determined by many factors—by the supply of pork products processors have on hand, by trade requirements which may induce a processor to incur a loss, by the supply of hogs in the country, both present and prospective, by any limitation of the purchasing power of the public which may cause a shift of consumption to substitute foods. Prices obtained for pork products are governed by the same supply and demand factors and by the additional factor that forty per cent (40%) of the hog is sold as fresh pork which is highly perishable and must be disposed of within ten days after processing. Cured pork products must be sold within a limited number of months after processing. It follows that pork products must seek the market level.

Even if the price obtained by plaintiff upon the sale of the articles converted from any particular hog could be determined—and as shown by the plaintiff the same is impossible of ascertainment—the problem would still remain of determining what portion of the sale price so obtained is to be allocated to the reimbursement of the tax to plaintiff, and what portion, if any, to plaintiff's other costs.

Any finding made by the Commissioner on such issue is bound to be entirely conjectural. The question of the proper margin of profit for the processor is undetermined nor is there any criterion for the allocation of profits or losses to the items of tax and manufacturing cost. Any conjecture or opinion which may be reached by the Commissioner would be affected by innumerable

economic factors and matters incapable of legal proof, either affirmatively or negatively, and any conclusion must necessarily be based upon entirely arbitrary formulas or rules. A processing tax cannot be ear-marked against any particular sale. The District Court, upon review of the Commissioner's findings, is not presented with an intelligible basis for the review. Equally impossible of proof is the requirement that the processer show that the tax has not been passed back to the farmer.

The Supreme Court has held, in a case involving the tracing of the effect of a freight charge, with a view to ascertaining who bears the burden of an excessive freight charge, that difficulties of proof under circumstances less complex than those presented here are insuperable. In the case of *Southern Pacific Co. v. Darnell-Taenzen Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451, 455, the suit involved sections of the Interstate Commerce Act providing for recovery of excess freight charges. The court said, in an opinion by Justice Holmes, at page 534:

> "Behind the technical mode of statement is the consideration, well emphasized by the Interstate Commerce Commission, of the *endlessness and futility of the effort to follow every transaction to its ultimate result.* 13 Inters. Com. Rep. 680."

The case of *Burgess v. Transcontinental Freight Bureau,* 13 Int. Comm. Rep. 668, cited in the above case, contains the following statement, at page 680:

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, *it would never be possible to show damages with sufficient accuracy to justify giving them.*"

If the task is endless, futile, or even impossible, to attempt to prove the incidents of the burden of a freight charge, which is the last item of expense incurred in a transaction of sale, it is far more difficult to show or trace the economic burden of an expense such as a processing tax, which is payable at the first stage of processing.

In another analogous case, *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222, 223, 58 L. Ed. 1284, the defendants were indicted for violation of Kentucky statutes which had been construed as prohibiting any combination for the purpose of fixing prices at an amount "greater or less than the real value of the article;" and the real value of the article under Kentucky decisions was held to be the *market value under fair competition and under normal market conditions.* The Supreme Court held that the standard thus laid down was wholly speculative, as it required a determination as to what prices would have been under a wholly imaginary set of circumstances. The court said:

> "The reason is not the general uncertainties of a jury trial, but that *the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.* The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts."

Plaintiffs in the present case are required by section 21(d) to prove, in respect to processing taxes, elements more clearly speculative than were required to be proved

under the Kentucky decisions. A processor is required to prove that the tax was not passed on. The term itself is so vague and uncertain that it has been said to be entirely misleading and inaccurate. In *Lash's Products Co. v. United States,* 278 U. S. 175, Mr. Justice Holmes said (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's burden, but that is all. . . ."

A tax may be said to be passed on only if the prices charged the vendees are increased correspondingly because of the tax. *The question of net profit or loss does not determine the matter,* as a manufacturer may, without increasing his prices, earn the same net income as prior to imposition of the tax, through reduction in costs of operation, or through inventory gains having no relation to the tax. On the other hand, even though all the tax is passed on, items of increased costs, inventory losses or lowered output may result in a loss to the processor. The question of whether the processor has operated at a profit or at a loss will not necessarily indicate whether the tax has been passed on or whether the purchaser has been charged a higher price than he would have been charged except for the tax.

In effect, section 21(d) requires the processor seeking refund to prove what prices would have been paid to the producers and charged to the purchasers if there had been no tax. The claimant is required to evaluate the effect of the tax—which is only one of numerous fac-

tors affecting price—upon the prices paid for hogs and the prices charged for pork products, and to show as of a date many months past these purely fictitious prices with the factor of the processing tax eliminated. It is impossible, as the Supreme Court stated in the *International Harvester Co. v. Kentucky* case, *supra,* to reconstruct prices, leaving out any of the actual factors influencing either the seller or the purchaser at the time of the sale; and the Supreme Court has held that it is impossible to determine the effect of the elimination of a freight charge upon a sale. Market conditions are such that it is impossible to measure the effect of the processing tax upon prices in the packing business.

While section 21(d) is not entirely clear in this respect, it apparently requires that the tax on each hog must be traced and proof made, in the case of each sale of the articles manufactured from the hog, that the price paid for the hog was not reduced by any part of the tax; and also that the prices charged for the products were not increased by any part of the tax, or, if increased, then to what extent. It may be suggested that claimant without making proof as to each hog might by a comparison of average prices, furnish a basis for a rough *estimate* of what part of the amount of the tax was shifted to the farmer in lower prices or to the vendees in high prices. It is impossible to make the proof under this section in either manner. It has been shown that a processor can not keep track of the products from a particular hog. It is equally true that a comparison of average prices prevailing before and after the imposition of the tax is without probative value.

Any probative effect of an influence which might arise from an increase in the price to the vendee or a reduction

to the producer at the time the tax becomes effective, is quickly lost with the lapse of time and the intervention of other factors influencing the price which make it impossible to say that such increased price would not have been charged irrespective of the tax. Because of the fact that prices for pork products are not stable, but fluctuate daily, and vary in different markets on the same day, there is no standard whatsoever for comparing prices after the processing tax went into effect with prices before the tax become effective.

Nor is a comparison of the spread between the processor's cost and his selling price with the spread after the imposition of the tax a matter of any evidentiary importance, for the reason that there is no normal price spread for hog processes and no way of establishing one; and even if such normal spread were fixed and the spread was found to be greater after the imposition of the tax, it would still have to be determined what part of the excess spread was due to the tax and what part to other causes, including abnormal influences such as drought and the Government program of reducing production of hogs. Even if normal conditions prevail at all times, it would be impossible to determine to what extent fluctuation in prices was influenced by the single factor of the processing tax, or to what extent this item can be said to be responsible for any assumed excess spread.

While the operation of the processing tax as a factor in determining prices paid for hogs, as well as prices charged for pork products, is conceded, the *extent* of such operation is a fact which necessarily must rest not in proof, but in mere speculation. A remedy of refund which is based upon the proof of such speculative factors is wholly inadequate and illusory.

The provisions of the Act, as amended, are entirely novel and constitute a *distinct departure* from the long established policy of the Government with regard to recovery of taxes illegally exacted.

This departure from what has heretofore been regarded as an adequate remedy at law for illegally collected taxes is startling in several particulars.

In the case of taxes other than the processing taxes, it is required that a claim for refund shall be first filed with the Commissioner of Internal Revenue, and a waiting period of six months thereafter is required, to allow time for administrative consideration of the claim, the claimant is entitled to, and in fact must, prove his entire claim *de novo,* having only the burden of proving that the Commissioner's tax assessment was erroneous, and that the tax was not in fact due (*Reinecke v. Spalding,* 280 U. S. 227).

The marked dissimilarities of procedure between the remedy provided by the amendments and the provisions governing suits for refund of income, estate and gift taxes illustrate clearly the entire inadequacy of the remedy to which the processer is remitted. In the cases of income, estate and inheritance taxes, the Board of Tax Appeals function *before* payment of the tax is required and taxpayers are not bound to contest the tax before the Board of Tax Appeals, but may elect to pay the tax and pursue their remedies by suits for refunds in the courts; the Board of Tax Appeals is a separate and independent tribunal outside the Treasury Department—the tax determining agency; and the Board sits in review of the determinations of law made by the Commissioner of Internal Revenue and hears and decides the case upon evi-

dence *de novo,* as in suits in the District Courts. *International Banding Machine Co. v. Commissioner,* 37 F. (2d) 660.) The Board, in making the record reviewable by the courts, functions as does a District Court. It receives the case upon pleadings made pursuant to Rules of Practice, and receives evidence in accordance with the rules applicable to suits in equity in the Supreme Court of the District of Columbia. (*Phillips v. Commissioner,* 283 U. S. 589, 595, 596.) The Board issues subpoenas, both to private parties and to the Commissioner of Internal Revenue, supervises the taking of depositions, and in all respects functions as independently of the taxing authorities as do the courts. It is required to make findings of fact and conclusions of law in deciding cases before it, and its opinions are officially reported. (Sections 1211-1230, Title 26, U. S. C. A.)

In contrast, processing-tax payers must make their proofs at such informal hearings as the Commissioner shall see fit to prescribe, and before such of the employees of the Bureau of Internal Revenue as he may designate. Presumably (as indicated in paragraph (e) of section 21), employees of the Commissioner will make so-called field examinations of the accounts and records of the processing-tax payers, and these *ex parte* reports will be part of the record before the court, something never permitted in cases of other taxpayers. The Commissioner, in apparently unlimited administrative discretion, may receive *ex parte* affidavits and deny all rights of cross-examination. It is difficult to conceive of a more incomplete, inadequate, or confused procedure than that

authorized by section 21. The meager powers vested in the courts by the amendments fall far short of providing the judicial determination guaranteed by the Constitution.

Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289;

Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598;

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14, 68 L. Ed. 1278.

The constitutional right to jury trial, which exists in tax refund cases (*Garnhart v. United States,* 16 Wall. 162), is denied. A dependent governmental official is constituted both judge and jury, and the record of the cause is made by him.

It may be suggested that the court should assume that the Commissioner will make provisions for proper judicial determination of the questions of fact and law, but it is submitted that rather than subject plaintiff to the risk of irreparable injury through failure of an adequate remedy at law, it is necessary to maintain the injunction until the doubts and difficulties created by the Act have been cleared up and appropriate administrative procedure established.

Entirely aside from constitutional objections and the question of the lack of due process, it is obvious that the remedy to which the processor is confined by the amendments is not sufficiently complete, adequate or available to meet the situation which faces the processor.

In any event, the portion of section 21 as amended which bars plaintiff from recovering processing taxes which it cannot prove have not been passed on to others is without justification.

The Collector may not, in a court of equity, resist a suit brought to enjoin him from illegal seizure of plaintiff's property, upon the ground that plaintiff cannot show that he has not exacted an equal amount from the vendee or some other person.

Under the amended Act plaintiff, under a possible construction, would not be entitled to a refund of any portion of the tax paid if "any part of such amount" has been passed on the vendee, so that plaintiff, in order to clearly establish a claim for refund, would, apparently, be required to show that no consideration whatever was obtained on sale of its products. Despite the fact that plaintiff has not passed the tax to the vendee, and in fact has suffered a loss of several thousand dollars monthly for several months past in the operation of its hog business, it will, nevertheless, be unable to recover back the amount of any tax illegally levied.

The provisions of Section 156 of Title 26 of U. S. C. A., which applied to claims such as plaintiff's prior to the amendment of August 24, 1935, placed no restraint whatsoever as to the amount of illegal tax paid by plaintiff which could be recovered by it nor was there any requirement that plaintiff prove that the tax had not been passed on directly or indirectly to the vendee or to any other person in any manner.

The requirement imposed by the Act in this respect goes far beyond any provision of any previous statute.

In the case of *United States v. Jefferson Electric Manufacturing Co.*, 78 L. Ed. 859, 868, 871, 291 U. S. 386, 394, 402 (relied upon by appellee), the court held that the automobile accessory manufacturers' excise tax refund provision did not constitute a lack of *due process*. No

question of the relative adequacy of legal and equitable remedies was involved. The evidence showed and the trial courts apparently found that the manufacturer had charged a price for his products plus an amount representing the tax. The provision of Section 424 of the Excise Tax Act involved in that case merely required that the claimant establish "that such amount was not collected directly or indirectly from the purchasers." In the present Act the right to a refund is subject to the further requirements in this respect that the tax shall not have been included in the price "of any article processed from the commodity with respect to which it was imposed" and the claimant must show that he has not "passed on any part of such amount to the vendee or to any other person in any manner." He must also show "That the price paid by the claimant * * * was not reduced by any part of such amount." The Excise Tax Act further expressly provided, unlike the Agricultural Adjustment Act as amended, for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax. The tax involved in that case was upon the identical articles sold and not upon some other commodity from which the said articles had been converted. Likewise, the Excise Tax involved was made to take effect upon the very act of sale of the articles and not upon some prior transaction respecting some commodity from which these articles had subsequently been converted. The manufacturer therefore was not beset with the difficulties presented by the processing tax and was in a position to readily show whether the tax arising upon the sale had actually been borne by himself or by the purchaser.

Section 424 of the Revenue Act which was there in question, *made no changes* in the existing system of refunds (p. 397).

The Commissioner under that section was not the fact-finding body and did not create the record in the case, and the taxpayer was permitted to sue *de novo* in the District Court or the Court of Claims upon his claim. Again the Act applied only to refunds on sales taxes. *Indian Motorcycle Co. v. United States,* 283 U. S. 570. The tax being a tax on the sale, the purchaser was the real party in interest unless the manufacturer could prove he had borne the burden of tax, which is one of the items making up the cost of operation. On the other hand, the processing tax is not upon the sale but upon the first act of manufacturing. The purchaser is not the real party in interest because the tax does not operate upon the sale to the purchaser.

In the *Jefferson Electric* case, the specific amount of the tax paid with respect to the article sold was a definite specific amount which was established beyond controversy.

Obviously there was nothing arbitrary in the requirement of that Act that the manufacturer either prove that he had not collected the tax from the purchaser or give a bond to reimburse the purchasers. The case is no authority for the contention that the existence of a right of recovery, even under the provisions of that Act, should stay the hand of equity in enjoining the enforcement of exactions of taxes, the validity of which is questioned. Certainly no case has gone so far as to hold that equity will consider as adequate a remedy at law which is subject to the drastic limitations of the Agricultural Adjustment Act as amended; and any such ruling would be directly contrary to the well established rule of prior decisions that the remedy at law in order to deprive equity of jurisdiction must be adequate, speedy, plain, and complete, and not an impracticable or theoretical remedy which does not reason-

ably and fairly meet the situation or is not as efficient to the ends of justice or to its prompt administration as the remedy in equity.

As set forth in plaintiff's complaint, the original bill amending the Agricultural Adjustment Act as passed by the House of Representatives took away entirely the right of a processor to recover taxes illegally collected. It is evident from a consideration of the operation of the amendment as finally passed that while it does not purport to take away entirely the remedy of the processor, it will in actual operation have that effect. If the Act had gone through as originally proposed it would have been unconstitutional as an attempt to cure an illegal and unauthorized tax by denying all remedy to the taxpayers. (*Graham v. Goodcell,* 282 U. S. 409, 430, 75 L. Ed. 415, 441.) The amendment as passed, is calculated to reach the same result by presenting such substantial and, in fact insuperable, obstacles that the nominal remedy is not actually available or effective.

The fact that all or part of a tax has been or may possibly be passed on creates no equity in the Government. The relations between the processor and his customers may be affected, depending upon the terms of the contract betwen them, but this furnishes no defense to the Government in an action to restrain the collection of the tax in the first instance. If the injunction is denied on the ground that the refund provision is adequate, then any type of illegal exaction may be enforced against a manufacturer or vendor upon the plea that it has, in fact, been passed on to the public.

As stated by Judge Paul, in the case of *Shenandoah Milling Company v. N. B. Early, Jr., etc.* (September 23, 1935); (D. C. Va.):

> "I am not impressed by the argument that the government should not be compelled to pay the taxpayer anything except what he himself can show he had paid. That position is that the government wants to keep money it has illegally collected from some one else because that other person can not show where he got it. The equities of the government are not above the equities of the citizen."

(a) *The Fact That Under the Amendments There Is No Accurate Method for Computing Plaintiffs' Damage, and That the Amount Cannot Be Adequately Proved, in Itself Requires Equitable Relief Against the Exaction of Illegal Levies.*

It was asserted in defendant's brief, heretofore filed, that plaintiff has "a complete remedy at law under the provisions of the Act itself. *If it cannot supply the evidence to sustain this allegation it is no better in its equity action than it would be at law*, for, as heretofore pointed out, if the provision requiring such proof is valid it must be made in equity as well as in law . . ." (p. 40.)

The true rule is the exact converse of this statement. It is well settled the fact that there is no certain method for computing the amount of the recovery at law or for adequately proving the amount of damages is, in itself, and without regard to any other circumstances, sufficient to give equity jurisdiction and entitles a party to equitable relief.

In the equity action, unlike the law action, it is unnecessary to prove the extent of the loss. It is only necessary to show that there will probably be some loss; the amount is immaterial.

In the law action plaintiff cannot recover the difference between the amount of the processing tax which it cannot prove it did not pass on and the amount of such processing tax which it actually did not pass on. As shown in the record, it cannot recover this latter amount—even though it shall equal the full amount of the tax—due to the absence of any certain method, under the circumstances, for computing the amount not passed on or for adequately proving such amount.

As stated in 32 *Corpus Juris,* pp. 62, 63, Sec. 40:

> "An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be *accurately computed,* or where the amount cannot be *adequately proved.*"

In *Texas Co. v. Central Fuel Oil Co.* (C. C. A. 8), 194 Fed. 1, 11, 12, an order dismissing the bill was reversed with directions to grant a preliminary injunction to prevent violation of a monthly installment contract to deliver crude oil. The court said:

> "The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment."

And on the question of multiplicity of actions:

> "If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper."

The case was followed in *Marquette Cement Mining Co. v. Oglesby Coal Co.* (D. C. Ill.), 253 Fed. 107, 117, where the court said:

> "Equity jurisdiction was sustained, because plaintiff *could not recover all the damages it might sustain, and because they were impossible of proof,* the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective."

In *Angier v. Webber,* 14 Allen 211, 92 Am. Dec. 748, 750, in a decision by Justice Bigelow, the court said:

> "The damages are in their nature such as not to *be susceptible of proof or exact computation;* and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy."

See, also:

Columbia College of Music etc. v. Tunberg (Wash.), 116 Pac. 280, 282;

Crouch v. Central Labor Council (Ore.), 293 Pac. 729, 732;

Chas. C. Wilson & Son v. Harrisburg (Me.), 77 Atl. 787, 791;

Pitts v. Carothers (Miss.), 120 So. 830, 831-832;

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100.

Defendant has never at any time suggested and counsel have not been informed of any method whatsoever by which plaintiff may prove, as it is required to do under the Act as amended, the sales price of each "article processed from the commodity with respect to which" the tax was imposed and with respect to each such sale establish by proof the incidence of the tax. Such proof is entirely unavoidable.

At several places in defendant's brief, heretofore filed herein, the statement is made that it is incumbent on petitioner to show affirmatively in this present proceeding "*the complete status of its business*", including other than "hog products", even though such products are in no way affected by the tax, and the facts with reference to such products cannot be considered pertinent to any inquiry involved in this suit (p. 39).

If an answer to this contention is necessary, it is found in the case of *Oliphant v. Richman* (N. J.), 59 Atl. 241, 242, where the court said:

> "Irreparable damage does not mean that the complainant must show that *all his financial transactions*

will be ruined unless the relief sought is granted. It means that, *with reference to the particular right or property referred to in the bill of complaint,* the complainant will be irreparably deprived of it unless the relief sought is granted."

(2) *The Provision That in Any Judicial Proceeding Relating to the Claim for Refund "a Transcript of the Hearing Before the Commissioner Shall Be Duly Certified and Filed as the Record in the Case and Shall Be So Considered by the Court" (Sec. 21(d), Subdivision (1)), Is Such a Limitation on the Remedy at Law as to Constitute the Same Wholly Inadequate.*

There is no provision for a trial by jury and in fact no provision for any determination of the weight of the evidence, whether by court or by jury. Apparently the court on review of the Commissioner's decision would be bound by any evidence in the record, whether credible or otherwise.

The constitutional questions which arise under the Act as amended are questions which the claimant is entitled to present before a court which is empowered to hear any and all competent evidence, and which is not limited to the review of evidence before some inferior tribunal.

In *Chicago, B. & Q. R. Co. v. Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, the court held that a provision for a writ of error to the Supreme Court of the state to review the record of a board of equalization is not an adequate remedy. The court said:

"When such a charge as the present is made, it can be tried fully and fairly only by a court that *can*

hear any and all competent evidence, and that is not bound by findings of the implicated board for which there is any evidence, always easily produced."

Apparently, under the Act, the Commissioner is to be the final judge of the facts and no further evidence may be introduced before the court so that the review of the Commissioner's ruling is limited to the question of whether there is any evidence before the Commissioner tending to support his findings. The senatorial debates for Thursday, August 15, 1935, support this construction.

"Senator Borah: The court would have authority to take new evidence?

"Senator Smith: I think the record in the case, as in all tax cases, is made up here.

"Senator Borah: And that record would be conclusive?

"Senator Smith: That record would be conclusive.

"Senator Borah: *That is just the same as denying a man any right to go into court. That really nullifies the Senate provision."*

Senator Borah then remarked:

"Senator Borah: But the hearing is *before a political appointee;* that is, the Internal Revenue Commissioner. It is not before a judicial body but before a political body, and that political body, by its decision, determines whether or not the taxpayer is to have an opportunity in a judicial body."

In the same report Senator Johnson said:

"The report (*i. e.,* the conference report, which is the same as the Act) hedges about the right of the individual in such fashion as to make it extremely difficult for that right to be exercised at all."

(3) *The Provision That No Suit for Refund Under the Agricultural Act as Amended Based Upon the Invalidity of the Tax "Shall Be Maintained in Any Court, Unless Prior to the Expiration of Six Months After the Date on Which Such Tax Imposed by This Title Has Been Finally Held Invalid a Claim Therefore" Is Filed by the Person Entitled Thereto (Sec. 21(d) (2)), Renders Such Remedy Uncertain and Inadequate.*

It is doubtful, under this provision, whether claimant could, at the present time, file any claim or initiate any proceeding for the recovery at law of any tax paid by it. Apparently the initiation of such action must await a decision of the Supreme Court by which the Agricultural Adjustment Act as amended is finally held invalid. This uncertainty as to the availability, at present, of the remedy provided, is sufficient alone to give equity jurisdiction of the present action.

(4) *The Provision That Any Claim Filed for Refund Must Conform "to Such Regulations as the Commisioner of Internal Revenue, With the Approval of the Secretary of the Treasury, May Prescribe" (Sec. 21(d) (2)), in View of the Fact That, as Stated in the Record, No Such Regulations Have Been Prescribed, Renders the Remedy at Law Inadequate.*

As stated in the case of *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823:

> "In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted*, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.*"

(5) *The Provision That No Suit or Proceedings Shall Be Begun on Any Claim Before the Expiration of One Year From the Date of Filing Such Claim Unless the Commissioner Renders a Decision Within That Time (Sec. 21(d) (2)) Presents a Further Limitation Upon the Legal Remedy Which, in View of the Facts of This Case, Renders the Legal Remedy Inadequate.*

The limitation prescribed by Section 156 of Title 26, U. S. C. A., which was applicable to all such refund claims prior to August 24, 1935, was six months. The extension of such period for an additional period of six months, in view of the multiplicity of issues necessarily presented by a claim for refund by plaintiff, and the vast amount of detailed evidence necessary to present a claim for each month of the year, renders the remedy provided so inadequate and impracticable as to warrant the interposition of equity.

Until the provisions of the Act have received judicial interpretation by the Supreme Court it is impossible to say what a claimant's rights are. Relief should be granted until all doubt is removed. The Supreme Court has held that any doubt as to the construction or uncertainty as to the operation of a refund statute warrants granting of an injunction against the collection of taxes.

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 62 L. Ed. 1110;

Atlantic Coast Line v. Daughton, 262 U. S. 413, 67 L. Ed. 1051.

The amendments in question are entirely novel and constitute a complete departure from existing refund remedies. Obviously, the adequacy of the remedy is seriously impaired, if not entirely destroyed. It follows that, even though more than one meaning may be given to the amendments in question, the remedy therein provided is so uncertain that equity should take jurisdiction until the doubt has been removed through a final decision of the Supreme Court.

The prevention of a full right of review is, in itself, sufficient to constitute the remedy inadequate; likewise, the uncertainty of the provisions and their doubtful constitutionality are, in themselves, sufficient to render the remedy inadequate. The uncertainty of the provisions is strikingly illustrated by the refusal of counsel for defendant to assume a definite position with respect to any of the provisions of the amended Act, or on any of the questions raised involving either the construction or validity of the amendment.

The Supreme Court has repeatedly held that where the meaning of a statute purported to afford a legal remedy is not entirely clear, the claimant should not be required to assume the risk of an unfavorable construction, but should be granted equitable relief.

Davis v. Wakelee, 156 U. S. 680, 687-688;

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 295-296;

Hopkins v. Telephone Co., 275 U. S. 393, 399;

In *Union Pac. Ry. Co. v. Weld County,* 247 U. S. 282, 285, 62 L. Ed. 1110, 1116, the court said, after referring to decisions under an earlier statute:

> "If that section is still in force *unqualified and unmodified,* the conclusion below that in this case there is a plain, adequate, and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions.
>
> * * * * * * * *
>
> "And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is *involved in uncertainty, an essential element of the requisite remedy at law is wanting;* for, as this court has said: 'It is a settled principle of equity *jurisprudence* that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief, plaintiff ought not to be compelled to *speculate upon the chance of his obtaining relief at law.*' Davis v. Wakelee, 156 U. S. 680, 688."

In *Atlantic Coast Line v. Daughton,* 262 U. S. 413, *supra,* the court said:

> "But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision we cannot say the remedy at law is plain and adequate."

(B) *A Court of Equity Is Not Deprived of Jurisdiction to Grant Injunctive Relief, Where the Remedy at Law Is Not Equally Plain, Speedy, Complete or Practical, and as Efficient to Attain the Ends of Justice Both in Respect of the Final Relief Sought, and the Mode of Obtaining It, as Is the Relief in Equity.*

In *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, 303, 48 L. Ed. 188, the court said at page 303 (192):

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to *without impediment created otherwise than by the act of the party,* and the remedy or defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, *arising other than by reason of its own act.*"

In *Standard Oil Co. v. Atlantic Coast Line R. Co.* (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637, aff. 275 U. S. 257, 72 L. Ed. 270, the court held that equity could assume jurisdiction of an action to enjoin a railway from charging excess freight over reasonable charges. The court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable, and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity. * * *

"No recovery could be allowed a plaintiff in such an action until he had established to the satisfaction of the jury, not only that the rates charged were unreasonable, but the *extent* of their unreasonableness. * * *

"So, in trying to enforce in this court its common-law right of action, the plaintiff would be confronted with *substantial obstacles, with which it is not confronted in this equity action.*"

In *Clark v. Pigeon River Improvement etc. Co.* (C. C. A. 8), 52 Fed. (2) 550, 557, the court said:

"That remedy, however, must be one that is adequate, speedy, plain, and complete, *not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation* to accomplish the purposes of justice."

See also:

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2) 269, 271;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Nutt v. Ellerbe (Three-Judge court, S. C.), 56 Fed. (2) 1058, 1063;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 1116;

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823;

Magruder v. Belle Fourche Valley Water Users' Association (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

VI.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which Equity Will Grant Relief.

Under the Act as amended, plaintiff will be required to file a claim for refund for each month's tax paid and such claim upon rejection will give a right of action thereon. Whether such actions be brought singly or in groups, the difficulty of the situation as it affects the claimant will be the same. It must prove separately as to each month the amount of tax paid and the circumstances of each purchase and sale during this taxable period. The disadvantage of multiple actions would not be mitigated in the least by delaying action until the causes of action had accumulated or until the end of the statutory period. In any view of the Act as amended the plaintiff is remitted to the choice between utterly ruinous delay and engaging in repeated and prolonged litigation only slightly less ruinous.

That the rule as to multiplicity cannot be narrowly construed is well illustrated by the case of *Hale v. Allinson,* 188 U. S. 56, 47 L. Ed. 380, relied upon by defendant:

> "Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the pre-

vention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided *upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied;* these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on the ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will *practically* prevent a multiplicity of litigation and will be an *actual convenience* to all parties, and will not unreasonably overlook or obstruct the material interests of any."

It is readily seen that an application for refund remedy provided by the Act as amended will result in exactly the same situation as that before the court in *Hill v. Wallace,* 259 U. S. 54, for the reason that the same detail of proof will be required as of each individual transaction.

There may be decisions in which the necessity of monthly suits or presentations of claims has been held not necessarily to result in a multiplicity of suits in the equity sense but we have not been cited to such decisions. The necessity of monthly suits under circumstances involving much less hardship than the refund remedy under discus-

sion has been held to give rise to multiplicity of actions in the equity sense.

Postal Cable Telegraph Co. v. Cumberland T. and T. Co., 177 Fed. 726 (D. C.);

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326 (Okla.);

Texas Co. v. Central Fuel Oil Co., 194 Fed. 1 (C. C. A. 8), *supra.*

Certainly, if the practical necessity of monthly suits is ever to be regarded as constituting a multiplicity of actions, the present case on this ground alone is a situation where equity will relieve from the hardship of unnecessary and interminable litigation.

The effect of the recent amendments to the Agricultural Adjustment Act is to multiply the difficulties of a refund suit both by its novel requirements of proof of the circumstances of each purchase and sale and by the enforced delay in the institution of the original proceedings and also by the confusing nature of the procedure for prosecution of the claim.

VII.

Section 3224 of the Revised Statutes Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

The section reads:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This language, like the language of section 21 (a) referred to in the succeeding point, is broad enough on its face to bar any injunction suit against the collection of taxes. However, the Supreme Court has held many times that the prohibition of the statute is not absolute.

It is well established that plaintiff's right to injunctive relief is not barred by the provisions of section 3224 of the Revised Statutes if a showing is made of the inadequacy of the legal remedy or of other circumstances bringing the case within a recognized head of equity jurisdiction.

> *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 76 L. Ed. 422;
>
> *Skagit County v. Northern Pac. Ry. Co.*, 61 F. (2d) 638 (C. C. A. 9).

As stated in *Miller v. Standard Nut Margarine Co., supra,* it would require a special and particular provision to suggest a construction which would prohibit resort to the relief which equity affords in cases of inadequacy of legal remedy or other exceptional circumstances

In that case the suit was against the Collector of Internal Revenue to enjoin the collection of a tax, and it was defended on the ground that section 3224 was an absolute bar to injunctive relief. The court said at page 506, 507:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within *some acknowledged head of equity jurisprudence*, a suit may be maintained to enjoin the collector. (Citing cases.) Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. (Citing cases.) *The section does not refer specifically to the rule applicable to cases involving exceptional circumstances.* The general words employed are not sufficient, and *it would require specific language undoubtedly disclosing that purpose*, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to §3224 in a number of cases. (Citing cases.) It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. (Citing cases.)"

It appears, therefore, that where a taxpayer challenges the tax upon constitutional or other grounds going to the entire validity of the tax, the rule of the exception as to special and extraordinary circumstances is particularly applicable. The record in this case presents a situation where the legal remedy is not only plainly inadequate, but

in practical operation necessarily results in a multiplicity of suits. On both grounds the case comes within the category of special and extraordinary circumstances.

Hopkins v. Southern Cal. Telephone Co., 275 U. S. 393, 72 L. Ed. 329;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 37, 39, 52 L. Ed. 90;

Wallace v. Hines, 253 U. S. 66, 67, 64 L. Ed. 782;

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 410;

Atlantic Coast Line Ry. v. Daughton, 262 U. S. 413, 425, 67 L. Ed. 1051;

Wilson v. Illinois Southern Railroad Co., 263 U. S. 574, 576, 68 L. Ed. 456.

In the case of *Hill v. Wallace*, 259 U. S. 462, 68 L. Ed. 822, in an opinion written by Justice Taft, the court said:

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of §3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. *Were this a state act, injunction would certainly issue against such officers* under the decisions in *Ex parte* Young, 209 U. S. 123; Ohio Tax Cases, 232 U. S. 576, 587; McFarland v. American Sugar Refining Co., 241 U. S. 79, 82. Does §3224, Rev. Stats., prevent the application of *similar principles to a federal taxing act?*

> It has been held by this court, in Dodge v. Brady, 240 U. S. 122, 126, that §3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think *these exceptional and extraordinary circumstances with respect to the operation of this act make §3224 inapplicable.*"

It will be noted that the court specifically holds that the principles governing the exceptions to the application of Section 3224 are the same as those which the Supreme Court had laid down in suits involving injunctions against state taxes.

Whatever may have been the situation prior to the amendments of August 24, 1935, the conditions and burdens placed by the amendment upon the recovery of taxes illegally collected resulted in such special and extraordinary circumstances as to entitle the plaintiff to an injunction pending decision upon the merits.

VIII.

Section 21a of the Amended Act Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

Section 21a of the Agricultural Adjustment Act, as amended, provides:

> "SEC. 21. (a). No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title *on or after the date of the adoption of this amendment,* or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order."

(1) *Section 21(a) Was Not Made a Ground of Defendant's Motion to Vacate the Temporary Injunction, and Therefore Cannot Be Relied Upon as Supporting the Order Appealed From.*

The provisions of section 21a are not referred to directly or indirectly in the motion to vacate the injunction which was made upon the five grounds set forth. [Armour Tr. pp. 62-64.] The provisions of section 21a were referred to for the *first* time in these proceedings by defendant on the last page of its brief on the application of appellants for injunction pending appeal. The section was not presented to or considered by the trial court at the time of the hearing on the motion to vacate the injunction or at any other time. It is well settled that neither the appellant nor the respondent may suggest on appeal for the first time the ground for either upholding or opposing the ruling of the trial court which was not suggested to the trial court.

Alaska Salmon Co. v. Territory of Alaska (C. C. A. 9), 236 Fed. 62, 63;

Van Norden v. Chas. R. McCormick Lumber Co. (C. C. A. 9), 17 F. (2) 568;

Hercules Powder Co. v. Rich (C. C. A. 8), 3 F. (2) 12.

(2) *The Provisions of Section 21a of the Amended Act Are Limited in Application to Taxes "Imposed" on or After the Date of the Adoption of the Amendment.*

Obviously the phrase "*on or after* the date of the adoption of this amendment" modifies the preceding phrase "any tax imposed, etc." and does not refer back to the

clause beginning "no suit, action or proceeding, etc." The phrase "on or after the date of this act" is placed in a separately numbered subdivision 1, and its arrangement and punctuation indicate that the reference is to the tax rather than to the suit.

The Congressional Committee reports thoroughly indicate that this was the intent of Congress. The House Committee on Agriculture with reference to section 21a (which was then designated as 21b) contained the following:

> "Section 29 contains a proposed new section to the act (sec. 21 (b)), * which specifically denies the right to enjoin or restrain the collection of *any tax under the act imposed after the date of adoption of the amendment*, or to obtain a declaratory judgment in connection with any such tax." (74th Congress, 1st Session, House of Representatives, Report No. 1241, p. 20.)

This section therefore has no application to the present case.

(3) *Section 21(a) Should Not Be Construed, Even as to Future Taxes, as an Absolute Bar to Equitable Relief.*

(a) The section is substantially identical with section 3224 of Revised Statutes, and under well settled rules of construction is to be considered as a re-enactment merely of that statute.

That section 21(a) is a re-enactment of section 3224 is obvious from the fact that the latter section incorporates the *identical* language of the first.

In the following quotation we have set forth the pertinent portion of section 21(a) and have placed in italics the words taken from section 3224 (which are all the words contained in said section 3224).

> "Sec. 21(a). *No suit,* action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) *shall be* brought or *maintained in any court* if such suit, action or proceeding is *for the purpose* or has the effect (1) *of* preventing or *restraining the assessment or collection of any tax . . .*"

The italicized words comprise every word appearing in section 3224. The added words of course have no application to the present case.

As stated in *Hecht v. Malley,* 265 U. S. 144, 153, 68 L. Ed. 949,

> "In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and *made it a part of the enactment.*"

Heald v. District of Columbia, 254 U. S. 20, 65 L. Ed. 106;

Lattimer v. U. S., 223 U. S. 501, 56 L. Ed. 526.

For nearly a century, the Supreme Court had construed section 3224 not as an absolute bar, but as subject to exceptions. To assume that Congress did not intend that section 21(a) should be subject to these well established exceptions is to assume that Congress intended to deprive the processor of any means of questioning the constitutionality of processing taxes.

The purposes of such re-enactment of section 3224 have been suggested to be, among others, the following:

(aa) To extend the provisions of section 3224 to include, not only injunctions in the strict sense, but interlocutory orders in probate, administration, receivership and bankrutpcy proceedings. The solicitor for the Department of Agriculture, Mr. Seth Thomas, expressly stated, at page 23 of his opinion, after quoting section 3224:

"It is the Government's position that if such a provision is valid with respect to suits or proceedings which restrain the collection directly, then a similar provision may be made with respect to suits or proceedings which have *a similar indirect effect.*"

(bb) To make the provisions of section 3224 applicable to processing taxes as such, in order to meet contentions which had been advanced in suits involving the processing tax that the tax was not in fact a tax, which contentions had received judicial sanction in an opinion by Judge Barnes in the District Court of Illinois, and Judge Lindley in the District Court of Indiana.

(cc) To emphasize and call to the attention of the courts the rule established by section 3224 of the Revised Statutes.

(b) The provisions of section 21(a) are not to be extended beyond the clear import of the language used, and in case of doubt, are to be construed most strongly against the Government and in favor of the taxpayer.

Hecht v. Malley, 265 U. S. 144, 68 L. Ed. 949;

Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211.

(c) The fact that section 21(a) is a part of a legislative enactment which provides what was presumably considered a legal remedy, is a further reason for holding that the prohibition of the section does not apply to cases where the legal remedy turns out to be inadequate.

Section 3224 was originally a part of a statute which contained a provision affording a legal remedy, and it was held that the prohibition of the section would not be assumed to be applicable where the legal remedy is adequate.

(d) Under the decisions of the Supreme Court, it would have required specific language to render the prohibition of section 21(a) applicable in cases where the legal remedy is inadequate.

In *Miller v. Standard Nut Margarine Co.* (284 U. S. 498), 76 L. Ed. 422, the Supreme Court specifically stated that the general language of section 3224 was not sufficient to constitute an absolute bar to an injunction against the collection of tax, saying:

> "It would require *specific language undoubtedly disclosing that purpose,* to warrant the inference that Congress intended to abrogate that salutary and well established rule."

In order to comply with the rule of this case, it would have been necessary for Congress, in enacting section 21(a), to have expressly stated in said section that no suit should be brought or maintained, etc., "even though the remedy at law provided in subsection (d) shall not be full, complete or adequate." Only by such language could Congress have expressed beyond doubt its intention to make the prohibition against injunction

absolute. No such language was used. The section is in terms as general, so far as the question of the adequacy of the legal remedy is concerned, as are the terms of section 3224, Revised Statutes. The statement of the Supreme Court in *Miller v. Standard Nut Margarine Co.,* therefore, applies to the provisions of section 21(a) the same as to section 3224.

> *"The section does not refer specifically to the rule applicable to cases involving exceptional circumstances."*

(e) The fact that section 21(a) does not purport to take away *jurisdiction* from the courts, although Congress had the matter specifically brought to its attention when the amendments were under consideration, is also indicative of the absence of any intent to impair equity jurisdiction.

While the Senate Committee recommended specifically that jurisdiction be taken away from the courts in suits to recover prior taxes, *no such recommendation was made with regard to suits to enjoin* the collection of taxes. The question of the power of congress to limit or bar the right of the citizen to test the constitutionality of the act in court was discussed at length on the floor of the Senate, where the following comments, among others, were made:

> "Mr. Borah: I invite the senator's attention to the language of the amendment, which is that 'no federal or state court shall have jurisdiction to entertain a suit.'

"Mr. Logan: Could we deny jurisdiction to a federal court?

"Mr. Borah: I do not think we should take from a citizen *the right to go into court* to test the question of whether he has suffered by reason of the act either of the government or of anyone else.

"I am aware of the fiction which obtains that there must be consent before one can sue the government; that is a matter I shall discuss in a few minutes. But where there has been an actual wrong suffered, a wrong sustained, where property has been taken and rights have been denied, I do not believe we can justly or legally deny a citizen *the right to go into court.* I do not think in all conscience we can deny him *the right to bring a suit.* * * *

"*The matter of procedure* after the suit is brought may be curtailed or limited within reason, but not *the right* of the citizen to sue to test the legality of the federal government or a state, or a citizen of the government or a state." (*Congressional Record,* July 18, 1935, pp. 11,832-3.)

"Mr. Bailey: Mr. President, I am inclined to take the view that we do not have the power under the Constitution to enact such a law as this. We may pass such a statute, but I do not think it will ever be law in America." (*Congressional Record,* July 18, 1935, p. 11,840.)

"Mr. White: The particular language which appears on page 58 relates to a litigant; it undertakes to circumscribe or limit his rights, and it *relates also to the jurisdiction of a court of the United States. More than that, it relates to the jurisdiction of a state court.* Passing over the question of our authority over the jurisdiction of a state court, I wish to direct

a question as to our control over the jurisdiction in all cases of a United States court.

"The Constitution vests the judicial power of the United States in a Supreme Court, and in such courts of inferior jurisdiction as the Congress may create. Then it goes on and provides that this judicial power shall extend, among other things, to all cases arising under the Constitution of the United States.

"I wish someone would answer for me the question whether the testing of the constitutionality of a statute of the United States is not a question arising under the Constitution, and whether the authority of a United States court to pass on that question does not rest in the Constitution itself rather than upon a statute of the United States. Assuming that to be true, I next desire to ask whether we can take from one of the courts of the United States its jurisdiction to pass on the constitutionality of a statute of the United States.

"Personally, while I think we may do many things —we may limit in many ways, perhaps, the right of action—I have very serious doubt whether we can say to a United States court, the source of its power being in the Constitution, *'You shall not have jurisdiction* to answer the question whether a statute of the United States is or is not within the purview of the Constitution of the United States.'" (*Congressional Record,* July 18, 1935, pp. 11846-7.)

"Mr. George: * * * In other words, Mr. President, the provision in question is not precisely nor exactly a denial of consent to be sued, but *it is rather the denial of the jurisdiction of the court to entertain the suit."* * * * (*Congressional Record,* July 19, 1935, p. 11913.)

In the debates of August 15, 1935, Senator Johnson said:

> "I can only voice the objection that is mine, and to say that I do not approve, and that I regret exceedingly that we have gone so far as we have in this conference report *in the endeavor to deprive the ordinary American of access to the courts of the land.*"

There was no provision in the act as passed taking away jurisdiction from the courts, the committee report proposing such action having been rejected. If Congress had intended to deprive the courts of jurisdiction in actions to enjoin the collection of processing taxes, it would not have rejected the specific language of the Senate committe report containing this provision.

> *Fox v. Standard Oil Co.,* 294 U. S. 87, 79 L. Ed. Adv. Sh. 339.

(f) *Section 21(a) Should Not Be Construed as Taking Away the Jurisdiction of the Courts, for the Reason That it Applies, by Its Terms, Not Only to Federal but to State Courts. The Prohibition Runs to an Action "in Any Court".*

It cannot be assumed that Congress intended to prohibit injunctive relief in any court, whether state or federal, to a processor who might otherwise be entirely without remedy.

(g) *Section 21(a) Must Be Construed in the Same Manner as Section 3224, and Subject to the Same Exceptions and Applied Only Where the Legal Remedy Is Adequate, Otherwise the Fifth Amendment Is Violated.*

Any other construction would have the effect of taking property from the taxpayer without due process of law and would involve the Act in such serious constitutional doubt as to compel the rejection of such construction.

Graham & Foster v. Goodcell, 282 U. S. 409, 75 L. Ed. 415;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

"But, as this court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.' "

Panama Railroad Co. v. Johnson, 264 U. S. 748, 754, 68 L. Ed. 755.

The taxpayer's right to litigate the question of the validity of a tax *with the Collector of Internal Revenue,* is a property right which is protected by the due process clause, and against which the principle of the immunity of the sovereign from suit has no application.

Lipke v. Leiderer, 259 U. S. 557, 559, 562, 66 L. Ed. 1061, 1064;

Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289;

Regal Drug Corp. v. Wardell, 260 U. S. 386, 391, 67 L. Ed. 318;

Ettor v. Tacoma, 228 U. S. 148, 57 L. Ed. 773.

If Section 21(a) is construed as an absolute bar to injunction suits, regardless of the adequacy of the legal remedy, clearly it is unconstitutional to the extent that plaintiff is deprived of a substantial remedy and plaintiff's property is confiscated in violation of the Fifth Amendment. Accordingly, the decisions of the Supreme Court which required that Section 3224 be construed not as an absolute bar, but as applicable only where an adequate legal remedy is available, likewise require that the provisions of Section 21(a) be construed as constituting not an absolute bar, but one applicable only when the legal remedy proves adequate. There is no reason whatever for construing Section 21(a) in any other manner than Section 3224. The court retains the same jurisdiction under Section 21(a) as it has under Section 3224 of Revised Statutes.

As pointed out in *Gold Medal Foods, Inc. v. Landy* (D. C. Minn—Three Judges), decided October 22, 1935:

> "It is reasonable to believe that Congress in passing Section 21(a), presumed that every taxpayer was afforded an adequate and complete remedy at law. The history of our tax legislation justifies the conclusion that section 21(a) is bottomed on that assumption. The taxpayer's right to have the legality of a tax and his right to refund determined in a court of law has always been recognized as inviolate. It is repugnant to one's sense of justice and fairness that a taxpayer should be required to pay a tax, which he in good faith urges is unconstitutional,

and then by reason of legislation, be prevented from obtaining a determination as to its constitutionality. Under the present Act, Congress denies the taxpayer any right to recover a refund unless he complies with the conditions and pronouncements which are to be found in Section 21(d) (1). If the plaintiffs are right in their contention that the Government, in light of all the circumstances, has demanded proof of facts that are impossible to prove, in what manner can the taxpayer ever procure a ruling on the constitutionality of the law? The Federal Declaratory Judgment Act is denied him, and the Government asserts that he has no remedy in equity. If he cannot prove damages as demanded by this section, the constitutionality of the Act in any proceeding at law will become moot, notwithstanding the fact that damage and serious loss may have resulted to the taxpayer by the exaction of the tax. It must be recognized that, where a taxpayer has been required to pay an illegal tax, the mere fact that he has been or will be able to recoup such payment from a third party, will not preclude him from resorting to equity to restrain the collection of a tax where there is an utter absence of any remedy at law. If Congress has set up provisions that are impossible of performance, as claimed, then obviously the taxpayer is not only deprived of an adequate and complete remedy at law, but he has no remedy at all. The argument urged by the Government that, by the passage of Section 21(a), Congress intended to deprive the United States courts of any jurisdiction to entertain any suit in equity is not tenable."

In the case of *A. P. W. Paper Company, Inc. v. Riley,* (D. C. N. Y.—decided October 18, 1935, by Judge Cooper), the court said:

> "That in a tax law Congress may forbid injunction where it gives adequate remedy at large to recover illegally collected taxes, is well settled.
>
> "But that the Congress may by unconstitutional statutes denominated a tax law, take the property of the citizen without due process of law and then in the same statute forbid the citizen to seek injunction in a Court of Equity without giving him an adequate remedy at law, has yet to be established by highest authority. There are authorities which at least inferentially hold to the contrary."

The right to secure declaratory judgments in tax cases has been withdrawn. It is contended that section 21 (a) bars access to courts of equity. If this contention is upheld Congress may, by unconstitutional legislation, under the guise of a tax law, take the property of the citizen and retain it by the mere device of prohibiting redress at law or suit in equity against such legislation. There would be an end of constitutional government. Legislation thus nullifying the constitution will not be upheld in a court of equity.

IX.

Defendant's Contention That Plaintiff Has Been Guilty of Laches Is Entirely Without Basis in the Record. No Facts Are Presented Showing That Defendant Has Changed Its Position or Has Been Prejudiced in Any Manner.

Defendant asserted in the prior hearing that the plaintiffs herein have been guilty of laches. It is difficult to understand in what manner such fault can be attached to the plaintiffs. The plaintiffs have paid their taxes so long as no grave doubt was shown as to the validity of the law under which the taxes were levied, assessed and collected. The defendants here are not in a position to assert that the plaintiffs had no right to assume that a law enacted by Congress was a valid exercise of legislative power as granted to it by the Constitution. The plaintiffs were not advised of or given notice in any manner or charged with any notice of any act whereby the position of the defendants was in anywise changed. Defendant has not at any stage of the case offered any evidence or made any showing whatsoever as to any facts upon which to base its contentions on this issue. There was no showing before the court at the hearing of the motion to vacate the temporary injunction, and there are no facts in the record whatsoever which indicate or tend to indicate any change of position on the part of the Government or any injury sustained by it. It cannot be successfully maintained that plaintiffs are obligated to pay taxes unless there is a valid, statutory

enactment for the assessment levied and the collection of a tax. If the enactment was invalid it has not acquired validity through any delay on the part of plaintiffs.

This point was considered in the case of *Gebelein, Inc. v. Milbourne,* (D. C. Md.) where the court said:

> "It would seem rather that the taxpayer is entitled to credit for its effort to cooperate with the Government in paying the tax so long as it was financially possible for it to do so."

The question of laches, though not set forth as a ground by the defendants in the original motion to dismiss, was nevertheless urged at the time the motions were heard upon the respective judges of the District Court and fully presented before the denial by said judges of the motion to dismiss herein.

Conclusion.

Without further extending this brief—to excuse the length of which we can only suggest the novelty of the legislation and the complexity and importance of the questions of law and fact involved in the consideration of the validity, construction and operation of the statutes—we submit that the points herein advanced, considered together, entitle plaintiffs to have the injunctions continued in force. The admitted existence of serious doubt as to the constitutionality of the entire Act as well as to the validity and construction of the amendments to the Act and the uncertainty and ambiguity of the refund provisions, together with the showing of impossibility of making the proof which is required in order to recover a refund, the certainty of irreparable loss to the plaintiffs if the temporary injunction is not continued in effect, and the fact that plaintiffs, if the present appeal is denied, will be deprived of all opportunity of obtaining a judicial determination of the important questions involved—considered with the fact that the Government is not injured by the injunctions—require that the *status quo* be preserved pending hearing on the merits.

Plaintiffs are entitled to a reversal of the order appealed from for the additional reason that the order, on its face, shows that the trial court declined to exercise any discretion in passing upon the motion. The action of the trial court was not taken in view of any change of circumstances, nor was any change of circumstances shown which indicated or tend to indicate in any way that equitable relief was not appropriate. The order appealed from was made without any consideration of the circumstances re-

lied upon as warranting the retention of the injunction, but solely by reason of what the trial court erroneously considered to be the mandatory nature of the decision of this court in *Fisher Flouring Mills v. Vierhus,* and without any showing by defendant of any change in circumstances, or any showing of fact whatsoever.

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

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APPENDIX.

Section 21 of the Agricultural Adjustment Act, Added by Section 30 of the Act of Congress of August 24, 1935.

Sec. 21. (a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual

of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

* * * * * * * * *

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the com-

modity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall

establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefore (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part

of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

* * * * * * * * *

(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930.

No. 7978

8

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MERCHANTS PACKING CO., a corporation,

Appellant,

v.

NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, and E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

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Appellees.

BRIEF FOR THE APPELLEES

Opinions Below

The only previous opinions in the present case are those of the District Court of the United States for the Southern District of California, Central Division, rendered July 27, 1935, in *The Luer Packing Company v. Nat Rogan, Collector* (R. 26), but not yet reported, and adopted as the opinion in this case (R. 29), entered upon the granting of appellant's application for preliminary injunction herein, and the opinion of said court rendered August 30, 1935 (R. 42), but not yet reported, upon

granting appellees' motion to vacate said preliminary injunction.

Jurisdiction

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the processing of hogs, and is taken from an interlocutory order and decree of the District Court granting appellees' motion to vacate the preliminary injunction which was entered August 30, 1935. (R. 42.) The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 13, 1935 (R. 52-53), pursuant to Section 129 of the *Judicial Code*, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether this suit is prohibited by Section 3224 of the *Revised Statutes.*

2. Whether this suit may be maintained where the appellant has a plain, adequate, and complete remedy at law.

3. Whether the bill presents a substantial question on the merits.

Statutes Involved

The applicable provisions of the statutes involved will be found in Appendices A and B in the brief for appellee in the case of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, now pending before this Court.

Statement

This suit was commenced in the District Court for the Southern District of California, Central Division, on

July 3, 1935, by the Merchants Packing Company, a corporation, as plaintiff, against Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, individually and as acting Collector of Internal Revenue for the Sixth District of California, and Guy T. Helvering, Commissioner of Internal Revenue, as defendants. (R. 3, 21.) From the bill of complaint (R. 3-21), the amendment thereto (R. 34), the second amendment thereto (R. 35-37), and the supplemental complaint (R. 44-48), it appears that appellant is a California corporation with its principal offices and place of business at Los Angeles in said State, where it is engaged in the business of processing hogs within the purview of the Agricultural Adjustment Act (R. 3-4). The appellee Nat Rogan is United States Collector of Internal Revenue at Los Angeles, California. (R. 4.) The appellee E. H. Cohee is described in the bill as acting Collector of Internal Revenue at Los Angeles, California. (R. 4.)

At the time of filing the bill of complaint, processing taxes were about to be assessed against appellant with respect to the processing by it of hogs during the month of May, 1935, in the amount of $2,934.16, which became due and payable under the terms of the Agricultural Adjustment Act, as amended, on or before June 30, 1935. (R. 15-16.)

Appellant avers that it was without an adequate remedy at law because it could not file a claim for refund after payment of such taxes, and in the event of the rejection thereof, to file suit for the refund of such taxes,

for the reason that a judgment obtained thereon would be of no force or effect in that the Congress had made no appropriation for the payment of any such refunds. Appellant avers that unless such tax is paid when due, it will become liable to the imposition of heavy penalties. (R. 16.) The bill prays for preliminary and thereafter permanent injunction against the appellees, restraining them from collecting or attempting to collect in any manner said taxes from appellant and for declaratory judgment. (R. 19-20.)

As a basis for such injunctive relief, the bill charges that the Agricultural Adjustment Act, as amended, is unconstitutional and the taxes imposed thereunder are illegal for reasons not here material (R. 11-15); that there was a threat of removal of appellant's remedy at law to litigate the validity of such tax and the constitutionality of said Act because there was pending before the Congress a bill amendatory of the Agricultural Adjustment Act which purported to deny to a processor the right to bring suit for the refund of processing taxes in the event that said Act should be declared unconstitutional; that neither of the appellees could respond to a judgment against him for the wrongful collection of the taxes sought to be enjoined in the event said Act should be declared unconstitutional or void; that unless restrained and enjoined from the collection of such taxes, the appellees will file liens against the property of appellant which would result in destroying the value of appellant's property and business and would prevent it from selling any of its inventory; that unless such taxes are paid, the appel-

lees will attempt to collect the same by distraint, causing appellant to suffer irreparable damage, and that appellant will have no way or manner within which to recoup its losses or damages; and that there will be danger of a multiplicity of suits (R. 17-19).

From the bill of complaint, appellant moved for preliminary injunction, which motion was sustained on August 9, 1935. (R. 30-33.) Prior to the hearing on the motion for preliminary injunction, appellees filed a motion to dismiss the bill of complaint (R. 22-23), which motion was denied (R. 29).

Subsequent to the granting of the preliminary injunction herein, appellant filed a second amendment to its complaint on September 6, 1935, in which it is recited that since the assessing and levying of processing taxes against it, appellant's profit from its business has been diminishing until such business actually showed an operating loss. Appellant charges that such loss is directly attributable to the assessment, levy and collection of said processing tax. (R. 35-37.)

Under date of August 22, 1935, appellee Nat Rogan filed his motion to vocate the injunction theretofore granted in said cause (R. 39-41), which motion was sustained on August 30, 1935 (R. 42-43). This appeal is from the interlocutory decree sustaining appellee's motion to vacate the preliminary injunction. (R. 52-56.)

Subsequent to the entry of the order sustaining appellee's motion to dissolve said injunction, appellant filed its supplemental complaint (R. 44-48), which pleads the enactment of amendments to the Agricultural Adjustment

Act which became effective August 24, 1935, and charges that said amendments have taken away from appellant all remedy at law for the recovery of processing taxes, and that such amendments are void, invalid and unconstitutional, upon the grounds set forth in the original bill of complaint as to the validity and unconstitutionality of the Act prior to the amendment. The supplemental bill further avers that additional processing taxes for succeeding months, including the month of August, 1935, have accrued, become due and payable, and that appellant's property is liable to distraint and seizure unless such taxes are paid. (R. 47.) An injunction pending appeal has been granted by this Court.

Argument

This appeal involves the identical questions that are presented in the appeal of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, now pending before this Court. The appellee's position is fully presented in the brief for the appellee filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellee's brief in that appeal are served herewith upon counsel for the appellant.

Conclusion

For the reasons stated in the brief for appellee in the appeal of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, it is urged that the court below correctly denied appellant's motion for preliminary injunction. Because the court below is without jurisdiction to restrain

or enjoin the collection of the taxes described in the bill, or to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be remanded to the District Court with instructions to dismiss the bill.

Respectfully submitted,

FRANK J. WIDEMAN,
JAMES W. MORRIS,
Assistant Attorneys General.

SEWALL KEY,
ANDREW D. SHARPE,
ROBERT N. ANDERSON,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

CLYDE THOMAS,
Assistant United States Attorney.

November, 1935.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

STANDARD PACKING COMPANY, a corporation,
Appellant,

vs.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,
Appellee,

E. M. COHEE, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District,
Defendant.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 7981.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

STANDARD PACKING COMPANY, a corporation,
Appellant,

vs.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,
Appellee,

E. M. COHEE, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District,
Defendant.

Transcript of Record.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Names and Addresses of Solicitors.

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Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney,
CLYDE THOMAS, Esq.,
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Federal Building,
Los Angeles, California.

United State of America, ss.

To NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, one of the defendants herein, and PEIRSON M. HALL, United States Attorney for the Southern District of California, and CLYDE THOMAS, assistant United States Attorney for said District, his Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14th day of October, A. D. 1935, pursuant to an order allowing an appeal filed and entered on the 14th day of September, 1935 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit in equity filed and now pending in the District Court of the United States, Southern District of California, Central Division, numbered 698-H in said Court wherein Standard Packing Company, a corporation, is plaintiff and appellant and you are defendant and appellee to show cause, if any there be, why the order made by said District Court vacating the preliminary injunction rendered against plaintiff and appellant, as in the said Order Allowing Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 14th day of September, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth year.

Paul J McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Service of the following papers in the matter of the appeal of plaintiff in the within mentioned cause acknowledged this 14th day of September, 1935, to-wit:

Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Citation. Peirson M. Hall PEIRSON M. HALL, United States Attorney By Clyde Thomas Assistant United States Attorney.

Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

STANDARD PACKING COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. COHEE, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, Defendants.	NO. Eq. 698-H IN EQUITY BILL OF COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION.

The plaintiff, Standard Packing Company, a corporation, brings its bill of complaint against the defendants, Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, and complains and represents:

I.

That plaintiff is a corporation incorporated, organized and existing under the laws of the State of California, and was so incorporated on the 28th day of September, 1913; that it was incorporated for the purpose, among

other things, of slaughtering hogs and of packing, curing and selling pork and all hog products; that such corporation is a citizen of the State of California, and has its principal office and place of business in the City of Vernon, County of Los Angeles, State of California, and in the said Sixth District of California.

II.

That said defendant, Nat Rogan, is the duly appointed, qualified and acting Collector of Internal Revenue of and for the said Sixth District of California; and that said Nat Rogan is a citizen of the United States and of the State of California, and resides in the City of Los Angeles, State of California, and in the Sixth Collection District.

That said defendant, E. M. Cohee, was for many months prior to the 1st day of July, 1935, the Acting Collector of Internal Revenue of and for the Sixth District of California, and as such was duly appointed and qualified to perform the duties of that office; that he is now the Chief Deputy Collector of Internal Revenue of said District; and that he resides in the City of Los Angeles, County of Los Angeles, State of California, and in the said Sixth Collection District, and is a citizen of the United States and of the said State of California; and that such deputy is frequently in charge of the matter of collecting said revenue in said District in the temporary absence of the Collector.

That it is the duty of said Nat Rogan, as said Collector for said District to collect or attempt to collect in such District all internal revenue payable therein, including all taxes, fines and penalties assessed against this plain-

tiff under the Agricultural Adjustment Act, hereinafter referred to, upon the hogs processed by plaintiff as defined in such Act; and that it is the duty of said E. M. Cohee to make collection of such revenue in the absence of said Nat Rogan, said Collector.

III.

That the said Sixth District was heretofore by law established as a subdivision of the United States for the purpose of the convenient collecting of taxes provided by the Internal Revenue law of such United States, and comprises and embraces the whole of that part of California lying south of a line constituting the north boundary lines of San Luis Obispo, Kern and San Bernardino Counties in said State of California.

IV.

That the matter in controversy exceeds in value the sum of $3,000.00, exclusive of interest and costs, and such matter and the controversy in relation thereto exist and arise under the Constitution and laws of the United States, of America, the relevant portions of which are hereinafter set forth and referred to.

V.

That for nearly twenty-two years last past plaintiff has been continually and actively engaged in the purchase, slaughter and processing of hogs and the sale of pork and hog products to retailers; and in the course of its business has developed and maintained a substantial and valuable trade and good will; and that said plaintiff at none of the times herein mentioned was engaged, nor is it now engaged, in interstate commerce in any degree in the operation of its said business, nor does the carrying on

of its said business in anywise obstruct or interfere with interstate commerce; that at all of the times herein mentioned said plaintiff, in the carrying on of its said business, slaughtered and processed and now slaughters and processes hogs only in the State of California, to-wit, in the said City of Vernon, and during such times transported and sold, and now transports and sells, the resulting pork and other products only within the boundaries of the said State of California, and not elsewhere.

VI.

That on May 12, 1933, the President of the United States approved PL #10 of the 73rd Congress of the United States (HR3835), known as the Agricultural Adjustment Act, 48 U. S. Stat. at Large, Part I, pp. 31, et seq., which said Act was thereafter amended June 16, 1933; April 7, 1934; May 9, 1934; May 25, 1934; June 16, 1934; June 19, 1934; June 26, 1934; June 28, 1934; and March 18, 1935, the same being Title I, Chapter 26, Act of May 12, 1933, U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive; that copies of the relevant sections and portions thereof are set forth in "Exhibit A", hereto attached and hereby referred to, and by such reference made a part hereof; and that the said Agricultural Adjustment Act is hereinafter, for the sake of brevity, sometimes referred to as the Act.

That the Act provides for the assessment and collection of what is styled in the Act a "tax", prescribes a formula by which the Secretary of Agriculture, a member of the Cabinet of the President of the United States, is to determine the measure or amount of such tax, and to specify and determine the circumstances under which the tax becomes payable; that under this Act taxes have been as-

sessed against the plaintiff in ruinous amounts and large sums have been paid by plaintiff on account, all as hereinafter specified in exact detail; that plaintiff charges, as hereinafter more particularly averred, that the Secretary of Agriculture ever since the 1st day of January, 1935, has ignored the formula specified in the Act in assessing the tax, and since said last mentioned date has assessed said tax and threatens to continue so to do in total disregard of the fact that the statutory conditions precedent to such assessment have ceased to exist; that plaintiff further charges, on the grounds hereinafter set forth, that, even if assessed as prescribed by the Act, the so-called tax is wholly illegal and void because the assessment thereof and the tax itself are in violation of the Constitution of the United States; and that plaintiff, being threatened with ruinous penalties for non-payment of said tax heretofore assessed under the Act against it and remaining unpaid, and being threatened with proceedings for the collection of said tax and penalties in a manner and to the extent that will wholly destroy the said business and good will of plaintiff, as hereinafter more particularly shown, and being without any adequate remedy at law, seeks the equitable relief herein prayed for.

VII.

That the provisions of said Act are applicable to hogs and a variety of other commodities; but for the sake of simplicity the provisions of the Act and the Act itself are herein analyzed as if it applied to and included only hogs.

That the objective of the Congress, as declared in the Act, is the restoration of a pre-war standard of value of hogs in terms of power to purchase such articles as farmers buy; that this objective is sought to be obtained

by a plan and scheme so to control the production of hogs as to raise their market price to the level at which the producer thereof will receive enough purchase money to enable him to buy, at current prices, as many of the said articles which farmers buy as, in the pre-war period, he would have been able to obtain by the sale of the same number of hogs.

That the nature of the control contemplated by the Act is to reduce production of hogs by the farmer to a point at which scarcity will result in a rise in the market price thereof, or otherwise to withdraw from the market hogs already produced, to the extent necessary to prevent the price from going down; that, however, instead of a direct statutory prohibition upon production, the scheme of the Act is to pay to the producer sums of money ample to deter him from production, thus substituting a pecuniary inducement to curtail production more potent and effective than an easily evaded prohibition.

That in order to acquire and raise the money necessary and required to make the aforesaid control of production effective, the Act directs the said Secretary of Agriculture to assess and levy on those slaughtering and processing hogs, and the resulting funds are then to be paid to the producers in the form of consideration or compensation for the theoretical losses sustained by the producer by and through the aforesaid resultant non-production.

That the statutory formula, contained in the Act, for determining the amount of the tax is that it is to be at such rate as equals the difference between the current average farm price for hogs and their fair exchange value determined as above averred; and the Secretary of Agriculture is empowered to make the necessary findings of

fact to effectuate the formula; that the tax is to be assessed against and collected from those processors, including the plaintiff, who buy hogs from the farmer and slaughter them for market; and that the slaughtering of the hog is defined by the act as "processing" and the tax is styled a "processing tax" but neither in fact nor in theory does the levy of the tax nor the determination of its amount bear any relation whatever to processing, but it appears to be so styled merely to identify who the citizens are who must pay the tax in order to raise the price to them of the hogs which the taxpayers buy.

That the scheme of the Act is not, however, confined to a reduction in the production of hogs; but the Act specifies a number of so-called basic agricultural commodities, all of which are subject to the same drastic regulations above described; that, in addition, the Secretary of Agriculture is given power to determine if the processing tax as levied upon the commodities specified in the Act and its amendments is causing or "will cause" a disadvantage to such commodities by reason of competition with any other commodities, or the products thereof; and if he finds such to be the case, he is empowered to proclaim such determination and a "compensatory tax" is thereafter to be levied upon such competing commodity or commodities, or the products thereof, at a rate to be determined and proclaimed by the Secretary of Agriculture; and that finally the Secretary is given power to license processors, associations of producers and others "to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing

commodity or product thereof"; that he may suspend or revoke any such license for violations of the terms or conditions; and any person engaged in such handling without a license as required by the Secretary is declared subject to a fine of not more than $1,000.00 for each day during which the violation continues.

That the dominant plan and scheme of the act as expressed therein is therefore to put in the hands of the Secretary of Agriculture effective and absolute control not only of the production of all agricultural commodities and the prices for which they are to be sold, but to give him equal control over the private business of all those who handle such commodities or their products, or any other products that may conceivably be deemed by him to be competitive.

And that according to its terms, the Act shall continue in its operation and in force and effect until such time as the President of the United States finds and proclaims that the National Economic Emergency, mentioned in the Act as the reason for the adoption thereof, has terminated and ended; that, however, such finding has not been made, and consequently said Act is yet effective and in force, and the said Collector of Internal Revenue for the Sixth Collection District is continuing and will in the future continue to collect, or attempt to collect said processing tax and otherwise execute the duties assigned to him under the Act, until and unless the Act is by decree of Court having jurisdiction thereof, adjudged to be unconstitutional and illegal, or until such

Collector is enjoined by such Court from all such execution of the terms of said Act.

VIII.

That by virtue of the supposed authority conferred upon him by the Act, the Secretary of Agriculture determined and proclaimed a processing tax on hogs, to become effective as of November 5, 1933, at a rate of fifty cents per hundredweight, live weight; and that the said rate of tax was subsequently increased as follows, to-wit, in December, 1933, to $1.00 per hundredweight, live weight; in February 1934, to $1.50 per hundredweight, live weight; and in March, 1934, to $2.25 per hundredweight, live weight; and that such rate of said tax has ever since been and now is in effect.

IX.

That under the Act said processing taxes are assessed and collected on the first domestic processing of the commodities, including hogs, and are required to be paid by the processor; that, as hereinbefore shown, plaintiff has been at all of the times herein mentioned and now is a processor of hogs as defined by the Act, and is required by the Act to pay to the Collector of said District monthly the said processing tax so fixed, determined and proclaimed by said Secretary of Agriculture with respect to all hogs slaughtered by it.

That at and during all the times herein mentioned said plaintiff has been and now is engaged in the business generally of slaughtering animals, including said hogs, and sell-

ing the same for human consumption, and as a part of such business, in preparing and manufacturing the meat and meat products therefrom; that said plaintiff has been at all said times and now is the owner of a large slaughtering house and packing house located in said City of Vernon, equipped with costly machinery and appliances for the successful carrying on and maintenance of said business, including the transportation and sale of said meat and meat products; but that all said business is entirely carried on, and the transportation and sale of all said meat and meat products are so transported and sold by it, only within the boundaries of the said State of California, and not in anywise in interstate commerce; nor does such business, transportation and sale in any degree obstruct or interfere with interstate commerce.

X.

That, therefore, such tax on the processing of hogs has been since the said 5th day of November, 1933, levied and assessed on all hogs processed by plaintiff during that time, and is now being so levied and assessed on all the hogs processed by plaintiff within the terms of the Act; that in addition to the illegal and unwarranted collection of said tax from plaintiff, said plaintiff has been and is continuing to be directly, oppressively and ruinously affected by such assessment and collection of such taxes.

That during the year 1934 plaintiff suffered a loss in the operation of its pork department of approximately $6,208.06, taking into consideration the cost of materials

and the fixed operating expenses; while for the first five months of the year 1935 such loss was the sum of $10,-496.62, on a like basis, and that such loss occurring is directly due to the levying and collection of said processing tax.

That prior to the levy of said tax, plaintiff was able, over a long course of years, to operate its said pork packing business on a satisfactory basis; that since the advent and collection of said tax from plaintiff, plaintiff has suffered, and will continue to suffer, so long as said Act is in force, large losses in its said pork packing business brought about directly by the collection of such tax, and, in fact, during such time plaintiff could not have continued and would not have continued in such business, excepting that the departments of plaintiff's meat packing business, other than the pork department, have succeeded in absorbing such loss to such extent that plaintiff has been enabled to carry on its meat packing business as an entirety, although such loss existed and was and is borne by plaintiff nevertheless.

That there has been levied and assessed against the plaintiff as a processor of hogs under the terms of the Act, commencing with all hogs processed on November 5, 1933, and thereafter, a processing tax, at the rate fixed by said Secretary of Agriculture, as aforesaid, on the live weight of all hogs processed by plaintiff from and after that date, and that plaintiff has paid on account of such tax to the Collector of Internal Revenue for said Sixth District the following sums of money for each of the following months since that time:

1933	
November	$ 2,008.87
December	4,992.20
1934	
January	5,653.35
February	6,546.74
March	6,317.14
April	6,672.16
May	6,111.60
June	8,322.21
July	7,489.64
August	5,751.07
September	5,716.57
October	6,612.98
November	6,177.28
December	6,345.45
1935	
January	6,112.46
February	6,263.07
Total	$97,092.79

And that for the months of March, April and May, 1935, there has been assessed against plaintiff a similar tax, as hereinafter shown, which yet remains unpaid.

That the said tax assessed against plaintiff, as aforesaid, in terms of percentage to the sales of pork made by plaintiff during said time was and is 22.78% for the year 1934, and 17.85% for the first five months of the year 1935; and the business of said plaintiff in its packing of pork cannot endure or make such payments

and continue to carry on such business, for the reason that the working capital allotted to such pork department of necessity will from time to time grow less and less and finally become entirely depleted.

That inasmuch as plaintiff cannot control the retail prices of pork, and the retailers of such commodity have been unable to raise the retail price thereof to such level that plaintiff is enabled to pass the amount of such tax on to the consumer, said plaintiff is compelled to bear the loss of that portion of the tax not absorbed by the consumer, which is considerable, and such loss is irreparable to said plaintiff, said plaintiff having no way to recover such loss.

XI.

That there has been assessed against plaintiff under said Act, as aforesaid, a processing tax in the following amounts, for the following months, the due date thereof being indicated, as follows:

1935	Amount of Tax	Due Date
March	$6,968.61	May 31, 1935
April	6,385.90	June 30, 1935
May	5,980.90	June 30, 1935

That said plaintiff has not paid the aforesaid taxes assessed for the months of March, April and May, 1935, for the reason so to do will create in its said pork packing business a further and additional loss to the extent and amount of such taxes, and furthermore, such plaintiff has been informed and believes, and therefore avers, that the assessment of such taxes is unconstitutional and void, and that any attempt to collect the same, or any

part thereof, is illegal and beyond the power of the Collector of Internal Revenue so to do.

Plaintiff further avers that so long as said Act is enforced, there will be levied and assessed against plaintiff processing taxes, in character and monthly average amount approximating the foregoing itemization of taxes, provided plaintiff continues during that time to slaughter hogs in like average volume as in the past, and that such future taxes cannot and will not be paid by plaintiff for the foregoing reasons.

XII.

That the failure of the plaintiff to pay said processing taxes, as and when due, will result in the imposition by the said Collector of Internal Revenue of the following penalties against plaintiff and the following losses to it:

(a) A penalty of interest at the rate of one per cent per month from the due date of each monthly installment of said tax;

(b) A penalty of five per cent of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the said Collector; said penalties being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent per month;

(c) After a second ten days' notice the Collector is authorized, under the provisions of the applicable law, if the tax, penalties and interest are not paid, to distrain the plaintiff's slaughtering house and plant, its manufactured products and merchandise on hand, cash on hand, bank accounts and all of its other property for the purpose of realizing the amount of the tax, penalty and interest;

(d) In adidtion thereto Section 19, subsection (b) of the Act provides: "That all provisions of law, including penalties, applicable with respect to the taxes imposed by Section 600 of the Revenue Act of 1926 and the provisions of Section 626 of the Revenue Act of 1932, shall insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title. * * *"

That under the provisions of this subsection (b), any person who willfully fails to pay said tax is subject to a fine of $10,000.00 or imprisonment, or both, with costs of prosecution, and is also liable to a penalty equal to the amount of tax not collected or paid.

That the plaintiff owns not only the slaughtering house and packing plant, together with the machinery and equipment hereinbefore described of great value, but manufactured products and merchandise on hand of a large value, and bank accounts and cash on hand; that repeated levies upon and distraint of this property from month to month will cause plaintiff irreparable loss and damage in that such levies and distraints will impair the valuable good will of its business built up since its incorporation, as aforesaid, and will seriously interfere with, if not prevent the actual operation of its plant and the sale of its products, and will result in a permanent injury to its business and good will in excess of $200,000.00; and if the said Collector of Internal Revenue should from month to month sell and dispose of such property under such distraint, the whole of said property and the good will of said business will become wholly lost to said plaintiff to its further irreparable damage in the premises.

That unless said defendants are enjoined and restrained by order of this Court from so doing, said defendants will assess processing taxes against plaintiff; impose said penalties upon plaintiff for the non-payment of the tax; collect from plaintiff the processing taxes now due or hereafter to become due, whether by distraint, levy, action at law or in equity; impose or give notice of intention to impose a lien or liens upon the property of plaintiff; make distraint upon the property of plaintiff on account of said tax and sell such property in collection of such tax; and thereby wholly take from plaintiff its said property and good will of said business; and that unless defendants are so restrained, and until hearing hereof temporarily enjoined, they will nevertheless proceed against plaintiff as above even though this Court shall have declared such tax to be illegal and unenforcible, and thereby render valueless to plaintiff such declaratory judgment.

XIII.

Plaintiff is advised and believes, and therefore avers and represents, that the processing tax levied by the Secretary of Agriculture upon the processing of hogs for the month of March, April and May, 1935, is invalid and void in that the rate of such tax has been fixed by the Secretary of Agriculture in complete disregard of the formula prescribed by the Agricultural Adjustment Act itself for the establishment of such rate; and plaintiff further avers that the Act provides, in Section 9 thereof, that the tax is to be at such rate as equals the difference between the current average farm price for the commodity taxed and the fair exchange value of that commodity; and that, as hereinbefore averred, the rate of tax was as of March, 1934, fixed by the Secretary of

Agriculture at $2.25 per hundredweight, live weight, of hogs, and such rate has been in effect continuously to the present date and is the rate upon which the tax for the months in question was assessed against plaintiff.

Plaintiff is informed and believes, and therefore avers, that for the first four months of the year 1935 the average current farm price of hogs, the fair exchange value therefor, and the resulting difference in dollars and cents between such figures, as calculated and determined by the Department of Agriculture, were as follows:

	Fair exchange value of pre-war parity farm price for hogs	Actual farm price for hogs	Excess of pre-war parity over actual
1935			
January	9.10 per cwt.	6.87 per cwt.	2.23 per cwt.
February	9.17 " "	7.10 " "	2.07 " "
March	9.24 " "	8.10 " "	1.14 " "
April	9.24 " "	7.88 " "	1.36 " "

That by reason of the current average farm price for the month of May, 1935, the excess of pre-war parity over the actual current price was even less than for the month of April; that the rate of such tax for the months in question is consequently substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question; and that for this reason the levy of the tax at the rate of $2.25 for the said months in question is arbitrary, capricious, oppressive and in disregard of the standards prescribed by the said Act of Congress, even though such Act be assumed to be valid; and that such tax so assessed against plaintiff for said months is void and uncollectible by reason of the failure to observe such standards, is in

excess of the authority conferred upon the Secretary of Agriculture, and is entirely unjustified even by the plan and scheme outlined by the Act.

XIV.

Plaintiff further represents that the said processing tax on hogs is unconstitutional, illegal and void for the following reasons:

(a) The scheme of local production-control set up by the Agricultural Adjustment Act is not within any of the powers conferred upon Congress by the Constitution of the United States; and if it is the exercise of any governmental power, it is of a power reserved to the states under the Tenth Amendment to said Constitution; that the declared policy of such Act is to limit production of farm products, to raise the price of such products, and to fix prices at an arbitrary level which will give the farmer the same purchasing power for his products or their fair exchange value as they presumably had in the period 1909-1914; that the power thus to control production is nowhere expressly or impliedly granted to Congress by the Constitution; that the processing tax is not a revenue measure but an integral part of a scheme to accomplish an unconstitutional purpose; and that the tax goes into effect only when benefit or rental payments are found necessary by the Secretary of Agriculture, and automatically ceases when farm prices reach the level fixed by the Act.

(b) The processing tax (considered apart from the scheme for production control) is not within the power granted to Congress by Article I, Section 8, of the Constitution of the United States "to lay and collect taxes, duties, imposts and excises"; and is in violation of the Fifth Amendment to the Constitution in that it takes prop-

erty without due process of law; that it is not a tax within the meaning of the Constitution; that it is merely an invalid means to accomplish an illegal end; that the proceeds of such tax are not levied for general revenue or for a public purpose, but on the contrary, the exaction is an arbitrary levy upon one class of citizens for the benefit of another class; that the rate of tax bears no reasonable relation to the property taxed, and is not based upon the amount of property involved or the amount of business done, but upon purely arbitrary and unrelated factors having to do only with the purchasing power of the proceeds derived from the sale of farm products; that these factors in turn are constantly variable, uncertain and impossible of exact determination; and the rate of tax is consequently indefinite and shifting; that the exaction is neither a tax on property nor a tax upon sales; and that the rate is exorbitant, confiscatory and destructive of lawful business.

(c) Assuming the tax to be otherwise valid, the power granted by the Act to the Secretary of Agriculture to determine and levy the processing tax involves an invalid delegation by Congress of its power to tax; for the Secretary of Agriculture alone determines at his own discretion the particular commodity to be taxed, when the tax is to be levied, what the rate of the tax shall be, when the tax shall begin, and when the tax is to cease; and that this is in violation of Article I, Section 1 of the Constitution aforesaid, as well as Article I, Section 8, paragraph 18 thereof.

(d) And lastly, the Act is violative of the Fifth Amendment to said Constitution, in that said Act interferes with and attempts to regulate intrastate commerce and to control and regulate wholly domestic affairs of the states respectively.

XV.

Plaintiff further shows and represents that an actual and immediate controversy exists between said plaintiff and defendants, in that said plaintiff has heretofore maintained and now maintains, and has so notified and advised the Collector of Internal Revenue of said Sixth District, that the said Act was unconstitutional, void and uninforcible for the reasons hereinbefore assigned for such unconstitutionality thereof, and has refused to pay the tax now due and payable by this plaintiff, as aforesaid, for that reason, as well as for the reason of its inability so to pay; whereas, on the other hand said Collector of Internal Revenue of said District has at all times maintained and now maintains, and has so stated to said plaintiff, that said Act is constitutional and enforcible, and that he intends to and will proceed to assess the tax provided by said Act on the hogs processed by this plaintiff, as aforesaid, and to collect such tax so levied under the terms and authority of said Act.

That said tax represents a continuing drain on the assets of plaintiff, which it cannot meet and still remain in business; that plaintiff has made request to said Collector of said District for an extension of time for the payment of the said tax assessed against said plaintiff for the hogs processed by it during the month of March, 1935, as aforesaid, but that defendants have recently notified said plaintiff that such request is denied, and that, therefore, further time cannot be obtained by said plaintiff for the payment of said March tax; that plaintiff has even offered to make an attempt to furnish the Collector of Internal Revenue for such District with a bond in an amount sufficient to cover the taxes, interest and penalties so due and

owing under the terms of said Act by said plaintiff, as aforesaid, but said Collector has refused to accept a bond even if plaintiff could have furnished such bond; and that, therefore, plaintiff has exhausted all efforts of obtaining any consideration or relief from said defendants, and they will proceed to collect said taxes under the terms of said Act and in the manner hereinbefore detailed; and that in aid thereof, said defendants will subject all of the property of said plaintiff to lien and distraint, and such lien and such distraint will prevent the sale or disposition of any of plaintiff's assets, and will completely and permanently destroy the business and good will of the plaintiff.

And that for these reasons it is me*te*, equitable and necessary that the aforesaid controversy should be determined between said parties.

XVI.

That plaintiff is in need of immediate equitable relief; that it has no adequate remedy at law and will suffer immediate, permanent and irreparable injury and damage unless the relief prayed for in this bill is promptly granted.

That the rate of said processing tax is so high that plaintiff is suffering an intolerable loss each month and will continue to do so as long as said Act is in effect; that said plaintiff cannot continue to pay the tax assessed against it and remain in the pork packing business, for the reason that the constant loss suffered in and by such business on account of the assessment and payment of said tax will greatly and finally exhaust and wholly deplete the asets and working capital of plaintiff used in such pork packing business.

That plaintiff has not the resources to pay the taxes each month and thereupon bring its action to recover each installment, even if such a remedy is technically available to it; that not only would there be involved a multiplicity of suits, but the delay incident to the termination of such actions at law would prove an effective deterrent because of the financial impossibility of making such payments, as well as is there grave doubt that any judgment obtained in any such suit would ever be paid to plaintiff.

XVII.

That in addition thereto the remedy of a suit by plaintiff, as aforesaid, to recover any such processing tax after payment by it under such Act would not on the one hand be of any benefit or gain to it, and on the other hand such action, in any event, will not be open and available to it; that as to the first instance, plaintiff is advised and believes, and therefore represents, that even if it should be successful in obtaining a final judgment or judgments in plaintiff's favor for the recovery and refund of such taxes so paid by it, such judgment would be wholly and effectually nullified by the Congress and the United States Government failing and refusing to make the necessary appropriation from the money in the Treasury of the United States, or to make other arrangements, for the purpose of the payment of such judgments, whether one or more; and in the second instance, that on or about the 18th day of June, 1935, the House of Representatives of the Congress of the United States enacted certain amendments (H. R. 8492) to the said Agricultural Adjustment Act, wherein among other things, it is provided that no suit or proceeding shall be brought or maintained, nor shall any judgment or

decree be entered by, any Court for a recoupment or refund of any tax assessed, paid, collected or accrued under said Act prior to the date of the adoption of said amendments, except and unless a final judgment or decree therefor should be entered prior to the date of the adoption of such amendment, nor for any taxes asssessed and collected after such amendments should be adopted; that doubtless such amendments will be likewise passed by the Senate and immediately thereupon signed and approved by the President of the United States, after which said plaintiff: would be powerless under the wording of the amendments above referred to to commence or maintain an action at law for the refund or recovery of any of such processing tax now assessed against it under said Act and remaining unpaid; that plaintiff is and will be unable not only to pay said tax, but if such should be paid, it would be unable to prosecute any suit or suits at law to final judgment before said amendments to said Act become effective.

That the mere threat that such amendments will become law, and doubtless such amendments will be enacted and become law, makes the availability of a legal remedy so doubtful, uncertain and hazardous, as to require and to entitle plaintiff to the equitable relief herein prayed for; and that plaintiff is advised and believes, and therefore represents, that should the proposed amendments become law, plaintiff will technically be deprived of any remedy at law by the express terms of the amendments, and, therefore, would be unable to test the validity of the assessment and collection of the tax in any proceeding whatever, unless the relief prayed for in this bill be granted as aforesaid.

SECOND CAUSE OF ACTION

FOR ANOTHER, FURTHER AND SECOND CAUSE OF ACTION AGAINST SAID DEFENDANTS, BEING FOR INJUNCTIVE RELIEF ONLY, said plaintiff complains and represents as follows:

I.

That plaintiff is a corporation incorporated, organized and existing under the laws of the State of California, and was so incorporated on the 28th day of September, 1913; that it was incorporated for the purpose, among other things, of slaughtering hogs and of packing, curing and selling pork and all hog products; that such corporation is a citizen of the State of California, and has its principal office and place of business in the City of Vernon, County of Los Angeles, State of California, and in the said Sixth District of California.

II.

That said defendant, Nat Rogan, is the duly appointed, qualified and acting Collector of Internal Revenue of and for the said Sixth District of California; and that said Nat Rogan is a citizen of the United States and of the State of California, and resides in the City of Los Angeles, County of Los Angeles, State of California, and in the Sixth Collection District.

That said defendant, E. M. Cohee, was for many months prior to the 1st day of July, 1935, the Acting Collector of Internal Revenue of and for the Sixth District of California, and as such was duly appointed and qualified to perform the duties of that office; that he is now the Chief Deputy Collector of Internal Revenue of said District; and that he resides in the City of

Los Angeles, County of Los Angeles, State of California, and in the said Sixth Collection District, and is a citizen of the United States and of the said State of California; and that such deputy is frequently in charge of the matter of collecting said revenue in said District in the temporary absence of the Collector.

That it is the duty of said Nat Rogan, as said Collector for said District to collect or attempt to collect in such District all internal revenue assessed against this plaintiff under the Agricultural Adjustment Act, hereinafter referred to, upon the hogs processed by plaintiff as defined in such Act; and that it is the duty of said E. M. Cohee to make collection of such revenue in the absence of said Nat Rogan, said Collector.

III.

That the said Sixth District was heretofore by law established as a subdivision of the United States for the purpose of the convenient collecting of taxes provided by the Internal Revenue law of such United States, and comprises and embraces the whole of that part of California lying south of a line constituting the north boundary lines of San Luis Obispo, Kern and San Bernardino Counties in said State of California.

IV.

That the matter in controversy exceeds in value the sum of $3,000.00, exclusive of interest and costs, and such matter and the controversy in relation thereto exist and arise under the Constitution and laws of the United States of America, the relevant portions of which are hereinafter set forth and referred to.

V.

That for nearly twenty-two years last past plaintiff has been continually and actively engaged in the purchase, slaughter and processing of hogs and the sale of pork and hog products to retailers; and in the course of its business has developed and maintained a substantial and valuable trade and good will; and that said plaintiff at none of the times herein mentioned was engaged, nor is it now engaged, in interstate commerce in any degree in the operation of its said business, nor does the carrying on of its said business in anywise obstruct or interfere with interstate commerce; that at all of the times herein mentioned said plaintiff, in the carrying on of its said business, slaughtered and processed and now slaughters and processes hogs only in the State of California, to-wit, in the said City of Vernon, and during such times transported and sold, and now transports and sells, the resulting pork and other products only within the boundaries of the said State of California, and not elsewhere.

VI.

That on May 12, 1933, the President of the United States approved PL #10 of the 73rd Congress of the United States (HR3835), known as the Agricultural Adjustment Act, 48 U. S. Stat. at Large, Part I, pp. 31, et seq., which said Act was thereafter amended June 16, 1933; April 7, 1934; May 9, 1934; May 25, 1934; June 16, 1934; June 19, 1934; June 26, 1934; June 28, 1934; and March 18, 1935, the same being Title I, Chapter 26, Act of May 12, 1933, U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive; that copies of the relevant sections and portions thereof are set forth in "Exhibit A", hereto attached and hereby referred to.

and by such reference made a part hereof; and that the said Agricultural Adjustment Act is hereinafter, for the sake of brevity, sometimes referred to as the Act.

That the Act provides for the assessment and collection of what is styled in the Act a "tax", prescribes a formula by which the Secretary of Agriculture, a member of the Cabinet of the President of the United States, is to determine the measure or amount of such tax, and to specify and determine the circumstances under which the tax becomes payable; that under this Act taxes have been assessed against the plaintiff in ruinous amounts and large sums have been paid by plaintiff on account, all as hereinafter specified in exact detail; that plaintiff charges, as hereinafter more particularly averred, that the Secretary of Agriculture ever since the 1st day of January, 1935, has ignored the formula specified in the Act in assessing the tax, and since last mentioned date has assessed said tax and threatens to continue so to do in total disregard of the fact that the statutory conditions precedent to such assessment have ceased to exist; that plaintiff further charges, on the grounds hereinafter set forth, that, even if assessed as prescribed by the Act, the so-called tax is wholly illegal and void because the assessment thereof and the tax itself are in violation of the Constitution of the United States; and that plaintiff, being threatened with ruinous penalties for non-payment of said tax heretofore assessed under the Act against it and remaining unpaid, and being threatened with proceedings for the collection of said tax and penalties in a manner and to the extent that will wholly destroy the said business and good will of plaintiff, as hereinafter more particularly shown, and being without any adequate remedy at law, seeks the equitable relief herein prayed for.

VII.

That the provisions of said Act are applicable to hogs and a variety of other commodities; but for the sake of simplicity the provisions of the Act and the Act itself are herein analyzed as if it applied to and included only hogs.

That the objective of the Congress, as declared in the Act, is the restoration of a pre-war standard of value of hogs in terms of power to purchase such articles as farmers buy; that this objective is sought to be obtained by a plan and scheme so to control the production of hogs as to raise their market price to the level at which the producer thereof will receive enough purchase money to enable him to buy, at current prices, as many of the said articles which farmers buy as, in the pre-war period, they would have been able to obtain by the sale of the same number of hogs.

That the nature of the control contemplated by the Act is to reduce production of hogs by the farmer to a point at which scarcity will result in a rise in the market price thereof, or otherwise to withdraw from the market hogs already produced, to the extent necessary to prevent the price from going down; that, however, instead of a direct statutory prohibition upon production, the scheme of the Act is to pay to the producer sums of money ample to deter him from production, thus substituting a pecuniary inducement to curtail production more potent and effective than an easily evaded prohibition.

That in order to acquire and raise the money necessary and required to make the aforesaid control of production effective, the Act directs the said Secretary of Agriculture to assess and levy on those slaughtering and proc-

essing hogs, and the resulting funds are then to be paid to the producers in the form of consideration or compensation for the theoretical losses sustained by the producer by and through the aforesaid resultant non-production.

That the statutory formula, contained in the Act, for determining the amount of the tax is that it is to be at such rate as equals the difference between the current average farm price for hogs and their fair exchange value determined as above averred; and the Secretary of Agriculture is empowered to make the necessary findings of fact to effectuate the formula; that the tax is to be assessed against and collected from those processors, including the plaintiff, who buys hogs from the farmer and slaughter them for market; and that the slaughtering of the hog is defined by the act as "processing" and the tax is styled a "processing tax", but neither in fact nor in theory does the levy of the tax nor the determination of its amount bear any relation whatever to processing, but it appears to be so styled merely to identify who the citizens are who must pay the tax in order to raise the price to them of the hogs which the taxpayers buy.

That the scheme of the Act is not, however, confined to a reduction in the production of hogs; but the Act specifies a number of so-called basic agricultural commodities, all of which are subject to the same drastic regulations above described; that, in addition, the Secretary of Agriculture is given power to determine if the processing tax as levied upon the commodities specified in the Act and its amendments is causing or "will cause" a disadvantage to such commodities by reason of competition with any other commodities, or the products

thereof; and if he finds such to be the case, he is empowered to proclaim such determination and a "compensatory tax" is thereafter to be levied upon such competing commodity or commodities, or the products thereof, at a rate to be determined and proclaimed by the Secretary of Agriculture; and that finally the Secretary is given power to license processors, associations of producers and others "to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof"; that he may suspend or revoke any such license for violations of the terms or conditions; and any person engaged in such handling without a license as required by the Secretary is declared subject to a fine of not more than $1,000.00 for each day during which the violation continues.

That the dominant plan and scheme of the Act as expressed therein is therefore to put in the hands of the Secretary of Agriculture effective and absolute control not only of the production of all agricultural commodities and the prices for which they are to be sold, but to give him equal control over the private business of all those who handle such commodities or their products, or any other products that may conceivably be deemed by him to be competitive.

And that according to its terms, the Act shall continue in its operation and in force and effect until such time as the President of the United States finds and proclaims that the National Economic Emergency, mentioned in the Act as the reason for the adoption thereof, has terminated and ended; that, however, such findings has not been made, and consequently said Act is yet effective and in force, and the said Collector of Internal Revenue for the

Sixth Collection District is continuing and will in the future continue to collect, or attempt to collect said processing tax and otherwise execute the duties assigned to him under the act, until and unless the Act is by decree of Court having jurisdiction thereof, adjudged to be unconstitutional and illegal, or until such Collector is enjoined by such Court from all such execution of the terms of said Act.

VIII.

That by virtue of the supposed authority conferred upon him by the Act, the Secretary of Agriculture determined and proclaimed a processing tax on hogs, to become effective as of November 5, 1933, at a rate of fifty cents per hundred weight, live weight; and that the said rate of tax was subsequently increased as follows, to-wit, in December, 1933, to $1.00 per hundredweight, live weight, in February, 1934, to $1.50 per hundred weight, live weight; and in March, 1934, to $2.25 per hundredweight, live weight; and that such rate of said tax has ever since been and now is in effect.

IX.

That under the Act said processing taxes are assessed and collected on the first domestic processing of the commodities, including hogs, and are required to be paid by the processor; that, as hereinbefore shown, plaintiff has been at all of the times herein mentioned and now is a processor of hogs as defined by the Act, and is required by the Act to pay to the Collector of said District monthly the said processing tax so fixed, determined and proclaimed by said Secretary of Agriculture with respect to all hogs slaughtered by it.

That at and during all the times herein mentioned said plaintiff has been and now is engaged in the business generally of slaughtering animals, including said hogs, and selling the same for human consumption, and as a part of such business, in preparing and manufacturing the meat and meat products therefrom; that said plaintiff has been at all said times and now is the owner of a large slaughtering house and packing house located in said City of Vernon, equipped with costly machinery and appliances for the successful carrying on and maintenance of said business, including the transportation and sale of said meat and meat products; but that all said business is entirely carried on, and the transportation and sale of all said meat and meat products are so transported and sold by it, only within the boundaries of the said State of California, and not in anywise in interstate commerce; nor does such business, transportation and sale in any degree obstruct or interfere with interstate commerce.

X.

That, therefore, such tax on the processing of hogs has been since the said 5th day of November, 1933, levied and assessed on all hogs processed by plaintiff during that time, and is now being so levied and assessed on all the hogs processed by plaintiff within the terms of the Act; that in addition to the illegal and unwarranted collection of said tax from said plaintiff, said plaintiff has been and is continuing to be directly, oppressively and ruinously affected by such assessment and collection of such taxes.

That during the year 1934 plaintiff suffered a loss in the operation of its pork department of approximately $6,208.06, taking into consideration the cost of materials and the fixed operating expenses; while for the first

five months of the year 1935 such loss was the sum of $10,496.62, on a like basis, and that such loss occurring is directly due to the levying and collection of said processing tax.

That prior to the levy of said tax, plaintiff was able, over a long course of years, to operate its said pork packing business on a satisfactory basis; that since the advent and collection of said tax from plaintiff, plaintiff has suffered, and will continue to suffer, so long as said Act is in force, large losses in its said pork packing business brought about directly by the collection of such tax, and, in fact, during such time plaintiff could not have continued and would not have continued in such business, excepting that the departments of plaintiff's meat packing business, other than the pork department, have succeeded in absorbing such loss to such extent that plaintiff has been enabled to carry on its meat packing business as an entirety, although such loss existed and was and is borne by plaintiff nevertheless.

That there has been levied and assessed against the plaintiff as a processor of hogs under the terms of the Act, commencing with all hogs processed on November 5, 1933, and thereafter, a processing tax, at the rate fixed by said Secretary of Agriculture, as aforesaid, on the live weight of all hogs processed by plaintiff from and after that date, and that plaintiff has paid on account of such tax to the Collector of Internal Revenue for said Sixth District the following sums of money for each of the following months since that time:

1933	
November	$ 2,008.87
December	4,992.20
1934	
January	5,653.35
February	6,546.74
March	6,317.14
April	6,672.16
May	6,111.60
June	8,322.21
July	7,489.64
August	5,751.07
September	5,716.57
October	6,612.98
November	6,177.28
December	6,345.45
1935	
January	6,112.46
February	6,263.07
Total	$97,092.79

And that for the months of March, April and May, 1935, there has been assessed against plaintiff a similar tax, as hereinafter shown, which yet remains unpaid.

That the said tax assessed against plaintiff, as aforesaid, in terms of percentage to the sales of pork made by plaintiff during said time was and is 22.78% for the year 1934, and 17.85% for the first five months of the year 1935; and that the business of said plaintiff in its packing of pork cannot endure or make such payments and continue to carry on such business, for the reason that the working capital allotted to such pork departmen

of necessity will from time to time grow less and less and finally become entirely depleted.

That inasmuch as plaintiff cannot control the retail prices of pork, and the retailers of such commodity have been unable to raise the retail price thereof to such level that plaintiff is enabled to pass the amount of such tax on to the consumer, said plaintiff is compelled to bear the loss of that portion of the tax not absorbed by the consumer, which is considerable, and such loss is irreparable to said plaintiff, said plaintiff having no way to recover such loss.

XI.

That there has been assessed against plaintiff under said Act, as aforesaid, a processing tax in the following amounts, for the following months, the due date thereof being indicated as follows:

1935	Amount of Tax	Due Date
March	$6,968.61	May 31, 1935
April	6,385.90	June 30, 1935
May	5,980.90	June 30, 1935
Total	$19,335.41	

That said plaintiff has not paid the aforesaid taxes assessed for the months of March, April and May, 1935, for the reason so to do will create in its said pork packing business a further and additional loss to the extent and amount of such taxes, and furthermore, such plaintiff has been informed and believes, and therefore avers, that the assessment of such taxes is unconstitutional and void, and that any attempt to collect the same or any part thereof, is illegal and beyond the power of the Collector of Internal Revenue so to do.

Plaintiff further avers that so long as said Act is enforced, there will be levied and assessed against plaintiff processing taxes, in character and monthly average amount approximately the foregoing itemization of taxes, provided plaintiff continues during that time to slaughter hogs in like average volume as in the past, and that such future taxes cannot and will not be paid by plaintiff for the foregoing reasons.

XII.

That the failure of the plaintiff to pay said processing taxes, as and when due, will result in the imposition by the said Collector of Internal Revenue of the following penalties against plaintiff and the following losses to it:

(a) A penalty of interest at the rate of one per cent per month from the due date of each monthly installment of said tax;

(b) A penalty of five per cent of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the said Collector; said penalties being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent per month;

(c) After a second ten days' notice the Collector is authorized, under the provisions of the applicable law, if the tax, penalties and interest are not paid, to distrain the plaintiff's slaughter-house and plant, its manufactured products and merchandise on hand, cash on hand, bank accounts and all of its other property for the purpose of realizing the amount of the tax, penalty and interest;

(d) In addition thereto Section 19, subsection (b) of the Act provides: "That all provisions of law, including penalties, applicable with respect to the taxes imposed by

Section 600 of the Revenue Act of 1926 and the provisions of Section 626 of the Revenue Act of 1932, shall insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title. * * *"

That under the provisions of this subsection (b) any person who willfully fails to pay said tax is subject to a fine of $10,000.00 or imprisonment, or both, with costs of prosecution, and is also liable to a penalty equal to the amount of the tax not collected or paid.

That the plaintiff owns not only the slaughtering house and packing plant, together with the machinery and equipment hereinbefore described of great value, but manufactured products and merchandise on hand of a large value, and bank accounts and cash on hand; that repeated levies upon and distraint of this property from month to month will cause plaintiff irreparable loss and damage in that such levies and distraints will impair the valuable good will of its business built up since its incorporation, as aforesaid, and will seriously interfere with, if not prevent the actual operation of its plant and the sale of its products, and will result in a permanent injury to its business and good will in excess of $200,000.00; and if the said Collector of Internal Revenue should from month to month sell and dispose of such property under such distraint, the whole of said property and the good will of said business will become wholly lost to said plaintiff to its further irreparable damage in the premises.

XIII.

Plaintiff is advised and believes, and therefore avers and represents, that the processing tax levied by the Secretary of Agriculture upon the processing of hogs for the months of March, April and May, 1935, is invalid

and void in that the rate of such tax has been fixed by the Secretary of Agriculture in complete disregard of the formula prescribed by the Agricultural Adjustment Act itself for the establishment of such rate; and plaintiff further avers that the Act provides, in Section 9 thereof, that the tax is to be at such rate as equals the difference between the current average farm price for the commodity taxed and the fair exchange value of that commodity; and that, as hereinbefore averred, the rate of tax was as of March, 1934, fixed by the Secretary of Agriculture at $2.25 per hundredweight, live weight, of hogs, and such rate has been in effect continuously to the present date and is the rate upon which the tax for the months in question was assessed against plaintiff.

Plaintiff is informed and believes, and therefore avers, that for the first four months of the year 1935 the average current farm price of hogs, the fair exchange value therefor, and the resulting difference in dollars and cents between such figures, as calculated and determined by the Department of Agriculture, were as follows:

1935	Fair exchange value of pre-war parity farm price for hogs	Actual farm price for hogs	Excess of pre-war parity over actual
January	9.10 per cwt.	6.87 per cwt.	2.23 per cwt.
February	9.17 " "	7.10 " "	2.07 " "
March	9.24 " "	8.10 " "	1.14 " "
April	9.24 " "	7.88 " "	1.36 " "

That by reason of the current average farm price for the month of May, 1935, the excess of pre-war parity over the actual current price was even less than for the month of April; that the rate of such tax for the months

in question is consequently substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question; and that for this reason the levy of the tax at the rate of $2.25 for the said months in question is arbitrary, capricious, oppressive and in disregard of the standards prescribed by the said Act of Congress, even though such Act be assumed to be valid; and that such tax so assessed against plaintiff for said months is void and uncollectible by reason of the failure to observe such standards, is in excess of the authority conferred upon the Secretary of Agriculture, and is entirely unjustified even by the plan and scheme outlined by the Act.

XIV.

Plaintiff further represents that the said processing tax on hogs is unconstitutional, illegal and void for the following reasons:

(a) The scheme of local production-control set up by the Agricultural Adjustment Act is not within any of the powers conferred upon Congress by the Constitution of the United States; and if it is the exercise of any governmental power, it is of a power reserved to the states under the Tenth Amendment to said Constitution; that the declared policy of such Act is to limit production of farm products, to raise the price of such products, and to fix prices at an arbitrary level which will give the farmer the same purchasing power for his products or their fair exchange value as they presumably had in the period 1909-1914; that the power thus to control production is nowhere expressly or impliedly granted to Congress by the Constitution; that the processing tax is not a revenue measure but an integral part of a scheme to accomplish an unconstitutional purpose; and that the tax goes into

effect only when benefit or rental payments are found necessary by the Secretary of Agriculture, and automatically ceases when farm prices reach the level fixed by the Act.

(b) The processing tax (considered apart from the scheme for production control) is not within the power granted to Congress by Article I, Section 8, of the Constitution of the United States "to lay and collect taxes, duties, imposts and excises"; and is in violation of the Fifth Amendment to the Constitution in that it takes property without due process of law; that it is not a tax within the meaning of the Constitution; that it is merely an invalid means to accomplish an illegal end; that the proceeds of such tax are not levied for general revenue or for a public purpose, but on the contrary, the exaction is an arbitrary levy upon one class of citizens for the benefit of another class; that the rate of tax bears no reasonable relation to the property taxed, and is not based upon the amount of property involved or the amount of business done, but upon purely arbitrary and unrelated factors having to do only with the purchasing power of the proceeds derived from the sale of farm products; that these factors in turn are constantly variable, uncertain and impossible of exact determination; and the rate of tax is consequently indefinite and shifting; that the exaction is neither a tax on property nor a tax upon sales; and that the rate is exorbitant, confiscatory and destructive of lawful business.

(c) Assuming the tax to be otherwise valid, the power granted by the Act to the Secretary of Agriculture to determine and levy the processing tax involves an invalid delegation by Congress of its power to tax; for the Secretary of Agriculture alone determines at his own discretion

the particular commodity to be taxed, when the tax is to be levied, what the rate of the tax shall be, when the tax shall begin, and when the tax is to cease; and that this is in violation of Article I, Section 1 of the Constitution aforesaid, as well as Article I, Section 8, paragraph 18 thereof.

(d) And lastly, the Act is violative of the Fifth Amendment to said Constitution, in that said Act interferes with and attempts to regulate intrastate commerce and to control and regulate wholly domestic affairs of the states respectively.

XV.

That plaintiff is in need of immediate equitable relief; that it has no adequate remedy at law and will suffer immediate, permanent and irreparable injury and damage unless the relief prayed for in this bill is promptly granted.

That the rate of said processing tax is so high that plaintiff is suffering an intolerable loss each month and will continue to do so as long as said Act is in effect; that said plaintiff cannot continue to pay the tax assessed against it and remain in the pork packing business, for the reason that the constant loss suffered in said tax will greatly and finally exhaust and wholly deplete the assets and working capital of plaintiff used in such pork packing business.

That plaintiff has not the resources to pay the taxes each month and thereupon bring its action to recover each installment, even if such a remedy is technically available to it; that not only would there be involved a multiplicity of suits, but the delay incident to the termination of such actions at law would prove an effective deterrent because of the financial impossibility of making such payments, as

well as is there grave doubt that any judgment obtained in any such suit would ever be paid to plaintiff.

XVI.

That in addition thereto the remedy of a suit by plaintiff, as aforesaid, to recover any such processing tax after payment by it under such Act would not on the one hand be of any benefit or gain to it, and on the other hand such action, in any event, will not be open and available to it; that as to the first instance, plaintiff is advised and believes, and therefore represents, that even if it should be successful in obtaining a final judgment or judgments in plaintiff's favor for the recovery and refund of such taxes so paid by it, such judgment would be wholly and effectually nullified by the Congress and the United States Government failing and refusing to make the necessary appropriation from the money in the Treasury of the United States, or to make other arrangements, for the purpose of the payment of such judgments, whether one or more; and in the second instance, that on or about the 18th day of June, 1935, the House of Representatives of the Congress of the United States enacted certain amendments (H. R. 8492) to the said Agricultural Adjustment Act, wherein among other things, it is provided that no suit or proceeding shall be brought or maintained, nor shall any judgment or decree be entered by, any Court for a recoupment or refund of any tax assessed, paid, collected or accrued under said Act prior to the date of the adoption of said amendments, except and unless a final judgment or decree therefor should be entered prior to the date of the adoption of such amendments, nor for any taxes assessed and collected after such amendments should be adopted; that doubtless such amendments will be likewise passed by the Senate and immediately thereupon signed and ap-

proved by the President of the United States, after which said plaintiff would be powerless under the wording of the amendments above referred to, to commence or maintain an action at law for the refund or recovery of any of such processing tax now assessed against it under said Act and remaining unpaid; that plaintiff is and will be unable not only to pay said tax, but if such should be paid, it would be unable to prosecute any suit or suits at law to final judgment before said amendments to said Act become effective.

That the mere threat that such amendments will become law, and doubtless such amendments will be enacted and become law, makes the availability of a legal remedy so doubtful, uncertain and hazardous, as to require and to entitle plaintiff to the equitable relief herein prayed for; and that plaintiff is advised and believes, and therefore represents, that should the proposed amendments become law, plaintiff will technically be deprived of any remedy at law by the express terms of the amendments, and, therefore, would be unable to test the validity of the assessment and collection of the tax in any proceeding whatever, unless the relief prayed for in this bill be granted, as aforesaid.

XVII.

That because of the fact said plaintiff has been advised and believes that said Agricultural Adjustment Act is unconstitutional, void and unenforcible, and that consequently the collection of a processing tax thereunder is unlawful and cannot be legally made and enforced, said plaintiff has concluded that such tax should not be paid further by it, and has refused to pay the said tax assessed, as aforesaid, for the said months of March, April and

May, 1935; as well as has plaintiff failed and refused to pay said tax, so remaining unpaid, for the additional reason it is unable to pay the same, and for the reason payment thereof by it, even if it could pay the same, would result in the utter ruin and consequent discontinuation of its pork packing business and the entire loss to plaintiff of the good will thereof.

That since said plaintiff has failed to pay the said tax assessed against it for the month of March, 1935, as aforesaid, said defendants have imposed a penalty of $348.43 against plaintiff and added same to said tax for that month, besides the interest provided by the Act to be charged upon non-payment of the tax; and will under the Act impose and add to the processing tax now unpaid, as well as to all future taxes assessed against plaintiff from month to month under the Act, additional penalties and interest.

That plaintiff has been informed and believes, and therefore avers, that under the terms of the Act said corporation, its officers and agents participating in such failure and refusal to pay said tax, are subject to arrest and to the fine and imprisonment provided in subsection (b) of Section 19 of the Act, for and on account of the refusal to pay said taxes assessed for the said months of March, April and May, 1935, or any part thereof, together with the penalties and interest thereon.

XVIII.

That said defendants threaten to do the following enumerated things and to take the following enumerated action and proceedings against plaintiff and its said property, and will do the things and take the action and proceedings, aforesaid, against plaintiff and its property,

with the following results, unless defendants are, and each of them is, by order of Court enjoined and restrained from doing such things and taking such action and proceedings against plaintiff and its said property, and threaten to and will do the said things and take such action and proceedings in the premises under the assumed power and authority given by the Act, and as directed thereby, to-wit:

Impose against plaintiff not only the penalties for the non-payment of the tax for the months of March, April and May, 1935, but the interest on the tax and on the penalties, as well.

Levy and assess further processing taxes on the hogs slaughtered or processed by plaintiff in the future, and impose like penalties and charge like interest thereon against plaintiff.

Create and cast a lien on plaintiff's said property and make distraint upon the same for and on account of and as security for the payment and collection of said tax, and do all this not only on account of the said tax now due and payable, but on account of taxes which might in the future be levied and assessed against said plaintiff for hogs processed by it hereafter.

Under such distraint, or otherwise, sell said property of plaintiff in order to realize and collect said tax, whether now assessed against plaintiff and remaining unpaid, or whether assessed against it in the future, such property, aforesaid, consisting of said slaughter house and packing plant, machinery and equipment contained therein or used in connection therewith, rolling stock, inventoried manufactured products, stock on hand, bills receivable, choses in action and money on hand and bank accounts, all

owned and possessed by plaintiff, at the present time, and having a reasonable market value of over $300,000.00.

And will otherwise demean themselves under the terms of said Act in relation to the processing tax assessed against plaintiff to the great and irreparable loss and damage of plaintiff.

XIX.

That the following are additional grounds and reasons why said defendants should be enjoined and restrained from doing the things and taking the action and proceedings, as aforesaid, against said plaintiff and its property, to-wit:

(a) That should said defendants create said lien upon said property, distrain and sell the same, as alleged, plaintiff will suffer irreparable loss and damage in that all of its said property, its business, including the pork packing business and the good will thereof, will be wholly swept away and lost to plaintiff; and thus destroy the aforesaid property and business of plaintiff and the good will thereof, all created and established by it over a period of nearly twenty-two years of ceaseless labor and efforts, without said plaintiff having any method or procedure under or by which it may have returned to it any of such property, good will and business, or any part thereof.

(b) That if said plaintiff should be relegated to its action or actions at law for the recovery and refund of any taxes paid in the future by plaintiff under the Act, assuming such action at law should be available to plaintiff, it would engender and result in a multiplicity of suits over and concerning the same subject matter between the same parties, in that since the tax becomes payable

monthly the plaintiff would be compelled to commence and maintain several actions in the premises for the recovery of the various installments of taxes paid; and that this proceeding would become and be most vexatious and exceedingly expensive to plaintiff.

(c) That said plaintiff has no remedy at law and is, therefore, compelled to bring its action in a Court of equity for the reasons alleged in paragraph XVI of this cause of action, the allegations of which paragraph are by reference hereby made a part of this subdivision (c).

XX.

Plaintiff further represents that heretofore it made request to said Collector of said District for an extension of time for the payment of said tax assessed against said plaintiff for the processing of hogs by it during the month of March, 1935, as aforesaid, but that defendants have recently notified said plaintiff that such request is denied, and that for that reason further time cannot be obtained by said plaintiff for the payment of said March tax; that said plaintiff even offered to make an attempt to furnish the Collector of Internal Revenue for such District with a bond in an amount sufficient to cover the said taxes for said three months, with the penalties and interest, but said Collector refused to accept the bond even if plaintiff could have furnished such bond; and that, therefore, plaintiff has exhausted all efforts of obtaining any consideration or relief from said defendants. Plaintiff offers to do all equity herein required of it by this Honorable Court.

WHEREFORE, plaintiff prays:

(a) That a writ of subpoena issue directed to said defendants requiring them to appear and answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived.

(b) That it be determined and adjudged by this Court that an actual and immediate controversy exists between plaintiff on the one side and the defendants on the other concerning and in relation to the constitutionality and enforcibility of the said Agricultural Adjustment Act and the consequential right to assess and collect the processing tax on hogs thereunder.

(c) That it be determined, declared and adjudged by this Court that said Agricultural Adjustment Act is unconstitutional, illegal and void for the reasons averred and shown in this bill of complaint; and that the processing tax assessed on hogs under the terms of the Act is unconstitutional, void and uncollectible likewise for the reasons averred in said bill of complaint.

(d) That the Court declare and adjudge that the tax assessed upon the processing of hogs for the months of March, April and May, 1935, and for such subsequent taxable periods as may properly be the subject of consideration by this Court, is invalid and void, in that as in this bill alleged, the rate of said tax is substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question, and that said rate has been maintained at this figure in total disregard of the formula expressly

prescribed by the said Act; and that the taxes for said months, as well as any subsequent taxes assessed under such rate, are arbitrary, capricious and oppressive, and in violation of the Fifth Amendment to the Constitution of the United States.

(e) That this Court adjudge and declare void any lien upon any property of the plaintiff that may now exist for the amount of any processing tax allegedly due from plaintiff under said Act, or for any interest, penalty or additions to such tax, and together with any costs that may have accrued in relation to the same.

(f) That a temporary as well as preliminary injunction be issued and granted by said Court to said plaintiff against said defendants, after notice and hearing if required by said Court, enjoining the defendants, and each of them, and the deputies, officers, servants and/or agents of said defendants, and of each of them, until the final hearing of the causes of action in this bill contained, or until further order of this Court made herein, from imposing, levying and assessing against the plaintiff any processing tax under and pursuant to said Agricultural Adjustment Act; from collecting or attempting to collect in any manner or by any proceeding the said processing tax assessed against plaintiff under the Act for hogs processed by it during the said months of March, April and May, 1935, and yet remaining unpaid, as well as from collecting or attempting to collect in any manner or by any proceeding any taxes hereafter levied and assessed against plaintiff for hogs processed hereafter; from imposing or attempting to impose upon the plaintiff any in-

terest or penalties on account of its failure to pay said processing tax, or any part thereof; from creating or filing a lien upon and from levying upon or distraining or selling the slaughtering house and packing plant, machinery and appliances therein contained or used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and bank accounts, or other property of the plaintiff, on account of the non-payment of said processing tax now due and unpaid, or hereafter to become due and payable under the terms and provisions of said Act; and from hereafter enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said taxes; all from the date of the issuance of said temporary injunction until the final decree of this Court in this action; and that upon the final hearing of this action said temporary injunction be extended and made permanent against said defendants, and against each of them, and the deputies, officers, servants and/or agents of said defendants, and of each of them.

(g) And that plaintiff may have all other and further relief agreeable to equity and good conscience.

STANDARD PACKING COMPANY

By T. P. BRESLIN

(Corporate Seal) Its President

JOSEPH SMITH
GEO. M. BRESLIN
Attorneys for said Plaintiff.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

T. P. BRESLIN being first duly sworn according to law deposes and says: That he is the president of the Standard Packing Company, a corporation, the plaintiff named in the foregoing bill of complaint and petition for declaratory judgment and injunction; that he has read said bill of complaint and petition and knows the contents thereof, and that the statements made therein are true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true; and that he is authorized to make and does make this verification for and on behalf of said corporation.

T. P. BRESLIN

Subscribed and sworn to before me this 1st day of July, 1935.

G. STUART SILLIMAN
Notary Public in and for the County
(Notarial Seal) of Los Angeles, State of California.

EXHIBIT "A"

(Pertinent sections of the Agricultural Adjustment Act)

The Policy of Congress:

"Sec. 2. It is hereby declared to be the policy of Congress

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the prewar period, August, 1909,—July, 1914. In the case of tobacco, the base period shall be the postwar period, August, 1919-July, 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage, which was returned to the farmer in the prewar period, August 1909-July, 1914."

Reduction Contracts, Benefit Payments, and Licenses:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments; and, in the case of sugar beets or sugar cane, in the event that it shall be established to the satisfaction of the Secretary of Agriculture that returns to growers or producers, under the contracts for the 1933-1934 crop of sugar beets or sugar cane, entered into by and between the processors and producers and/or growers thereof, were reduced by reason of the payment of the processing tax, and/or the corresponding floor-stocks tax, on sugar beets or sugar cane, in addition to the foregoing rental or benefit payments, to make such payments representing in whole or in part such tax, as the Secretary deems fair and reasonable, to producers who agree, or have agreed, to participate in the program for reduction in the acreage or reduction in the production for market, or both, of sugar beets or sugar cane. In the case of rice, the Secretary, in exercising the discretion conferred upon him by this section to provide for rental or benefit payments, is directed to provide in any agreement entered into by him with any rice producer pursuant to this section, upon such terms and conditions as the Secretary determines will best effectuate the declared policy of the Act, that the producer may pledge for

production credit in whole or in part his right to any rental or benefit payments under the terms of such agreement and that such producer may designate therein a payee to receive such rental or benefit payments. Under regulations of the Secretary or Agriculture requiring adequate facilities for the storage of any non-perishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest. (As amended by Sec. 14 of Public—No. 213—73rd Congress, approved May 9, 1934, and further amended by Sec. 7 of Public—No. 20—74th Congress, approved March 18, 1935.

(2) After due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: PROVIDED, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agree-

ment the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under Section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements. (As amended by Public—No. 142—73rd Congress, approved April 7, 1934.)

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000 for each day during which the violation continues.

(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this Title.

(5) No person engaged in the storage in a public warehouse of any basic agricultural commodity in the current of interstate or foreign commerce, shall deliver any such commodity upon which a warehouse receipt has been issued and is outstanding, without prior surrender and the provisions of this subsection shall, upon conviction, be punished by a fine of not more than $5,000, or by imprisonment for not more than 2 years, or both. The Secretary of Agriculture may revoke any license issued under subsection (3) of this section, if he finds, after due notice and opportunity for hearing, that the licensee has violated the provisions of this subsection."

Processing Taxes:

"Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that (1) in the case of sugar beets and sugarcane, the Secretary of Agriculture shall, on or before the thirtieth day after the adoption of this amendment, proclaim that rental or benefit payments with respect to said commodities are to be made, and the processing tax shall be in effect on and after the thirtieth day after the date of the adoption of this amendment, and (2) in the case of rice, the Secretary of Agriculture shall, before April 1, 1935, proclaim that rental or benefit payments are to be made with respect thereto, and the proces-

sing tax shall be in effect on and after April 1, 1935. In the case of sugar beets and sugarcane, the calendar year shall be considered to be the marketing year and for the year 1934, the marketing year shall begin January 1, 1934. In the case of rice, the period from August 1 to July 31, both inclusive, shall be considered to be the marketing year. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: PROVIDED, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that (1) if the Secretary has reason to

believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties, and if thereupon the Secretary finds that any such results will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity, and (2) for the period from April 1, 1935, to July 31, 1935, both inclusive, the processing tax with respect to rice shall be at the rate of 1 cent per pound of rough rice, subject, however, to any modification of such rate which may be made pursuant to any other provision of this title. In computing the current average farm price in the case of wheat, premiums paid producers for protein content shall not be taken into account. In the case of rice, the weight to which the rate of tax shall be applied shall be the weight of rough rice when delivered to the place of processing. In the case of sugar beets or sugarcane the rate of tax shall be applied to the direct-consumption sugar, resulting from the first domestic processing, translated into terms of pounds or raw value according to regulations to be issued by the Secretary of Agriculture, and the rate of tax to be so applied shall be the higher of the two following quotients: The difference between the current average farm price and the fair ex-

change value (1) of a ton of sugar beets and (2) of a ton of sugarcane, divided in the case of each commodity by the average extraction therefrom of sugar in terms of pounds of raw value (which average extraction shall be determined from available statistics of the Department of Agriculture); except that such rate shall not exceed the amount of the reduction by the President on a pound of sugar raw value of the rate of duty in effect on January 1, 1934, under paragraph 501 of the Tariff Act of 1930, as adjusted to the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter 1.

(c) For the purpose of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Commodities:

"Sec. 11. As used in this title, the term "basic agricultural commodity" means wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, and any regional or market classification, type, or grade thereof; but the Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such

commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, marketing, and consumption are such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof."

Appropriation:

"Sec. 12 (a) There is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy—and beef—cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy—and beef-cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000; PROVIDED, That not more than 60 per centum of such amount shall be used for either of such industries.

(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a) currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently became available under this subsection.

(c) The administrative expenses provided for under this section shall, include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title."

Tax on Competing Commodities:

"Sec. 15 (d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary upon the basic agricultural commodity."

[Endorsed]: Filed Jul 2, 1935. R. S. Zimmerman, Clerk; by Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

MOTIONS FOR PRELIMINARY INJUNCTION AND FOR TEMPORARY RESTRAINING ORDER WITHOUT NOTICE.

Now comes the Standard Packing Company, a corporation, the plaintiff in the above entitled action, and moves this Court on the verified bill of complaint and petition on file herein, for a preliminary injunction restraining said defendant, Nat Rogan, both individually and as Collector of Internal Revenue for the Sixth District of California, and his deputies, officers, servants and agents, during the pendency of the above entitled cause,

(1) From assessing or attempting to assess against, or collecting or attempting to collect from plaintiff, under the Agricultural Adjustment Act, mentioned and described in plaintiff's bill of complaint and petition on file herein, the processing tax therein provided to be assessed against and collected from plaintiff on processing of hogs by it, whether such collecting or attempt to collect such tax be by distraint, levy, sale and, or action at law or in equity;

(2) From collecting or attempting to collect said processing tax from said plaintiff in any other manner;

(3) From imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment of said processing tax;

(4) From enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said processing tax; and,

(5) From enforcing or attempting to enforce any of the provisions of said Act applicable to plaintiff in relation to said processing tax.

Plaintiff further moves the Court for a temporary restraining order to be issued forthwith and without notice, restraining said defendant Nat Rogan, both individually and as said Collector of Internal Revenue, from doing any of the acts herein stated until the said motion for said preliminary injunction can be heard, on the grounds and for the reasons that there is necessity for immediate restraint before hearing of said motion as revealed and shown by the facts averred in the said bill of complaint and petition, which facts are hereby referred to and made a part hereof by such reference, and that immediate, substantial and irreparable injury, loss and damage will result to plaintiff before a notice can be served and a hearing can be had on said motion for preliminary injunction herein.

Said motions will be made and based on said bill of complaint and petition and upon the consideration of the points and authorities filed herewith; and said motion for said preliminary injunction will be made and based additionally upon testimony adduced and affidavits presented at the hearing of such motion for said preliminary injunction.

Dated, Los Angeles, California, July 2, 1935.

Joseph Smith
Geo. M. Breslin
Attorneys for plaintiff.

[Endorsed]: Filed Jul. 2 - 1935. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE; AND TEMPORARY RESTRAINING ORDER.

To NAT ROGAN, both as an individual and as Collector of Internal Revenue for the Sixth District of California, and to his deputies, officers, servants and agents:

WHEREAS, in the above-named cause it has been made to appear by the verified bill of complaint and petition of plaintiff filed herein, that a restraining order preliminary to hearing upon application for a preliminary injunction is proper because of the allegations thereof of immediate and irreparable injury, loss and damage, and that prima facie the plaintiff is entitled to an order restraining temporarily the said defendant, Nat Rogan, individually and as Collector of Internal Revenue for said Sixth District of California, and his deputies, officers, servants and agents from doing the acts therein complained of and threatened to be committed.

NOW, THEREFORE, on motion of the plaintiff, by his attorneys, it is ordered that said Nat Rogan, both individually and as the Collector of Internal Revenue for the Sixth District of California, appear before the District Court of the United States, Southern District of California, Central Division, before Honorable H. A. Hollzer, Judge of said Court, at his Courtroom, in the Federal Building in Los Angeles, California, in said Dis-

trict, on the 12th day of July, 1935, at the hour of 10 o'clock A. M. of that day, then and there to show cause, if any there may be, why the preliminary injunction prayed for in said bill of complaint and petition and in [Hollzer J.] not said motion requested should ∧ issue.

And it appearing to the Court from the said bill of complaint and petition there is present danger that irreparable damage and injury will be caused plaintiff before notice can be served on defendant, said Nat Rogan, and a hearing had thereon, unless said Nat Rogan, individually and as said Collector, his deputies, officers, servants and agents, are restrained temporarily as herein set forth; for the reason as averred in the bill and petition certain taxes therein noted are due and payable and no further extensions for payment thereof can be obtained; that if said tax is not paid, and it cannot be paid and will not be paid for the reasons averred in the complaint, the said Collector of Internal Revenue threatens to and will in order to collect such tax distrain, levy upon and sell the property of plaintiff of a large value, thus irreparably destroying to plaintiff such property and the good will of its business described in the bill and petition; that plaintiff has no adequate and complete remedy at law for recovery as alleged in the bill and petition; that such injuries are irreparable to plaintiff because they cannot be compensated for in damages and may subject plaintiff to great penalties.

It is further ordered that said defendant, Nat Rogan, individually and as said Collector of Internal Revenue,

and all of his deputies, officers, servants and agents be and they are, and each of them is, restrained

(1) From assessing or attempting to assess against, or collecting or attempting to collect from plaintiff, under the Agricultural Adjustment Act, mentioned and described in plaintiff's bill of complaint and petition on file herein, the processing tax therein provided to be assessed against and collected from plaintiff on processing of hogs by it, whether such collecting or attempt to collect such tax by distraint, levy, sale and, or action at law or in equity;

(2) From collecting or attempting to collect said processing tax from said plaintiff in any other manner;

(3) From imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment of said processing tax;

(4) From enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said processing tax; and,

(5) From enforcing or attempting to enforce any of the provisions of said Act applicable to plaintiff in relation to said processing tax.

This temporary restraining order shall remain in force for ten days from the time of entry hereof, or until further order of the Court.

This temporary restraining order is granted without notice because such injuries are irreparable and liable to occur before a hearing upon notice can be had.

It is further ordered that copies of this order certified under the hand of the Clerk and the seal of this Court be served upon said defendant, Nat Rogan, both individually and as Collector of Internal Revenue for said Sixth District of California; and that such copies, together with said bill of complaint and petition be served upon said defendant both individually and as said Collector on or before the 3rd day of July, 1935; and a copy of said bill and petition on said defendant, E. M. Cohee, both individually and as said Deputy Collector, on or before such date.

This order signed and issued this 2nd day of July, 1935, at 9:40 o'clock A. M.

By the Court.

Hollzer
Judge.

[Endorsed]: Filed Jul 2 1935 R. S. Zimmerman, Clerk By F. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION

COME NOW defendants Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, defendants in the above entitled cause, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, allege:

I.

That the defendants are, and each of them is, a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II.

That the duties of said defendants are to collect taxes levied under the Internal Revenue Laws of the United States.

III.

That the complaint in the above entitled case seeks to enjoin defendants from collecting taxes levied under and by the Internal Revenue Laws of the United States.

IV.

Section 3224 Revised Statutes of the United States prohibits, the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax.

V.

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI.

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

DATED: This 5 day of July, 1935.

Peirson M. Hall
PEIRSON M. HALL
United States Attorney,

Clyde Thomas
CLYDE THOMAS
Assistant United States Attorney.

[Endorsed]: Rec'd copy of the within this 5th day of July, 1935 Joseph Smith & Geo. M. Breslin, attys for pl. By Geo. M. Breslin.

Filed Jul 5, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

MOTION TO DISMISS

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and move the court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I.

That the court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complainant has a plain, adequate and complete remedy in the ordinary course at law.

II.

That the United States of America is a real party in interest and it may not be sued without its consent.

III.

That there is no actual controversy between complainant and defendant, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV.

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V.

That the proceeding attempted to be instituted by this complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS
Assistant United States Attorney,
Attorneys for Defendants.

[Endorsed]: Rec'd copy of the within this 5th day of July 1935 Joseph Smith & Geo. M. Breslin attys for pl. By George M. Breslin

Filed Jul 5, 1935. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

MEMORANDUM OF CONCLUSIONS.

July 27, 1935.

By this suit plaintiff seeks both declaratory relief and also an injunction restraining the defendant Collector from enforcing collection of certain processing taxes levied pursuant to the provisions of the Agricultural Adjustment Act of May 12, 1933, and the regulations adopted thereunder. An order to show cause and temporary restraining order having been issued, the defendant collector has appeared and moved to dismiss the case. No issue has been raised as to any of the facts alleged in the verified complaint nor have any objections been interposed to the application for an injunction pendente lite, except such as are included in said motion to dismiss.

It appearing that there is grave doubt as to the constitutionality of the Act in question, particularly the provisions thereof applicable to the pending cause (See Schecter Poultry Corporation case decided by the Supreme Court May 27, 1935, also William Butler, et al, vs. United States, et al, decided by the United States Circuit Court of Appeals, First Circuit, July 13, 1935; Gold Medal Foods Inc. et al vs. Landry, etc, recently decided by the District Court in Minnesota); and

It appearing that there are unusual and exceptional conditions necessitating the issuance of an injunction, including the fact that the plaintiff will be driven to the

necessity of a multiplicity of suits if relegated to its remedy at law to protect its rights, (See Lee v. Bickell, 292 U. S. 415, 421).

This Court concludes that an injunction pendente lite should issue and that the motion to dismiss must be denied.

It further appearing that the facts alleged entitle plaintiff to declaratory relief (See Black v. Little, 8 Fed. Sup. 867 and cases therein cited),

The Court concludes that upon this additional ground the motion to dismiss must be denied.

[Endorsed]: Filed Jul. 27, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 27th day of July in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Harry A. Hollzer, District Judge.

STANDARD PACKING COMPANY, a corporation,
Plaintiff,
vs. : No. Eq. 698-H

NAT ROGAN, etc., et al,
Defendant :

For the reasons stated in the memorandum of conclusions this day filed, the motion to dismiss is denied, and a preliminary injunction will issue as prayed for, provided plaintiff furnish security to the defendants by undertaking with sufficient sureties in the amount of $35,000, that it will pay all taxes chargeable on the account referred to, together with all costs assessed by the court in the event it is finally decided that injunction was improperly issued or this action is dismissed.

In lieu of such undertaking, plaintiff shall have the option to deposit the amount fixed in money, with the clerk

of the court, subject to like conditions. The plaintiff shall continue to file with the defendant Collector monthly returns on all hogs processed, such returns to be made on the forms provided therefor by the Collector of Internal Revenue.

The court reserves the right to require additional security to be given from time to time as may seem necessary to protect the defendants, also the right to modify this order in any part or particular after notice to the parties.

Defendants are allowed twenty days after notice hereof within which to answer the bill of complaint.

An exception is allowed to the defendants with respect to this order.

[Title of Court and Cause.]

AMENDMENT TO MINUTE ORDER MADE IN SAID ACTION ON JULY 27, 1935.

Good cause being shown, the minute order made by the undersigned Judge of said District Court in said action on July 27, 1935, is hereby amended by changing and reducing the penal sum of the undertaking required by such order to be furnished by plaintiff from the sum of $35,000.00 to that of $25,000.00; and such minute order as so amended is hereby confirmed.

DATED, Los Angeles, California, this 31 day of July, 1935.

By the Court.

Hollzer

Judge of said District Court.

Approved as to form:

PIERSON M. HALL,

United States District Attorney

By Clyde Thomas

Deputy.

[Endorsed]: Filed Jul. 31, 1935 R. S. Zimmerman Clerk By M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

PRELIMINARY INJUNCTION.

This cause came on regularly to be heard this 12th day of July, 1935, before Honorable Harry A. Hollzer, Judge of the above entitled Court, on the application of said plaintiff for a preliminary injunction upon plaintiff's verified complaint and petition for declaratory judgment, due notice of the hearing of which application was given to defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, and on the written motion of defendants to dismiss the bill of complaint and petition for declaratory judgment; and after hearing counsel for the respective parties, and the matters having been submitted to the Court for its consideration; and it appearing to the Court, and the Court finds that it is true, that certain processing taxes are due and payable from plaintiff under the terms of the Agricultural Adjustment Act, hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act; that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition for the reason that there is immediate danger that said defendant, Nat Rogan, either individually or as Collector of Internal Revenue, will proceed under said Act to collect from said plaintiff said taxes, and in so doing will distrain, levy upon and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing to plaintiff an irreparable loss of such property and the good will of plaintiff's business likewise mentioned in said bill of complaint and petition; and that for each month said plaintiff fails

or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy and adequate remedy at law in the premises; that if said restraining order is not so issued there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act; and that for all these reasons a preliminary restraining order should issue herein against defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, as prayed for in said bill of complaint and petition.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1st. That said defendant, Nat Rogan, both individually and as Collector of Internal Revenue for the Sixth District of California, his officers, agents, servants, employees and attorneys and those in active concert or participation with him, and who shall, by personal service or otherwise, have received actual notice hereof, shall be and they are and each of them is hereby enjoined and restrained from imposing, levying, assessing, demanding or collecting, or attempting to impose, levy, assess or collect, against or from said plaintiff, Standard Packing Company, a corporation, any processing taxes now due from and payable by plaintiff under and pursuant to the said Agricultural Adjustment Act adopted by the 73rd Congress of the United States, and being

"An Act to relieve the existing economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such

emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of Joint Stock Land Banks, and for other purposes,"

which Act was approved on May 12, 1933, and all Acts amendatory thereof; from imposing, levying, assessing, demanding or collecting, or attempting to impose, levy, assess or collect, against or from said plaintiff any taxes hereafter to become due from and payable by plaintiff and arising under the terms of said Act on hogs processed by it; from imposing or collecting or attempting to impose or collect upon or from said plaintiff any interest or penalties on account of plaintiff's failure to pay any of said processing taxes payable by plaintiff under the force of the Act, whether now due or hereafter to become due from plaintiff; from imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment by plaintiff of any of said processing taxes whether now due or hereafter to become due from plaintiff under the Act; from levying upon, distraining or selling plaintiff's slaughtering house, packing plant, the machinery and appliances therein contained and used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and money in bank, or any of such property, or any other property of plaintiff, on account or by reason of such non-payment of said or any of said processing taxes, whether now due or hereafter to become due from and

payable by said plaintiff under said Act; all from the date of the issuance of this preliminary injunction until the final decree of the Court in this case, or until further order of this Court;

2nd. This injunction is granted upon the condition that the plaintiff shall furnish security to the defendant, Nat Rogan, as Collector of Internal Revenue, as aforesaid, by undertaking with sufficient sureties to be approved by the Court in the penal sum of $25,000.00 conditioned that plaintiff will pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court in the event it is finally decided this restraining order was improperly issued or this action is dismissed; provided, that in lieu of such undertaking, plaintiff shall have and is hereby given the option of depositing the said sum of $25,000.00 in lawful money of the United States with the Clerk of the above entitled Court, subject to like conditions; and upon the further condition that said plaintiff shall continue to file with said Nat Rogan as said Collector of Internal Revenue monthly returns on all hogs processed by it, as required by said Act, such returns to be made on the forms provided therefor by the said Collector of Internal Revenue;

3rd. The Court, however, reserves the right to require additional security from plaintiff from time to time as may seem to the Court necessary to protect the defendant, Nat Rogan, as said Collector of Internal Revenue, or to modify this order in any part or particular, after notice to the parties hereto; and

4th. That the said motion of defendants to dismiss plaintiff's bill of complaint and petition for declaratory relief is denied; and defendants are allowed twenty days after notice hereof within which to answer said bill of complaint and petition for declaratory relief.

DATED at Los Angeles, California, this 31 day of July, 1935.

By the Court.

HOLLZER
Judge of said District Court.

Approved as to form:

CLYDE THOMAS,
Asst. U. S. Atty.

[Endorsed]: Filed Jul 31, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE TEMPORARY INJUNCTION

TO STANDARD PACKING COMPANY, a corporation, plaintiff in the above entitled action, and

TO JOSEPH SMITH and GEORGE M. BRESLIN, its attorneys:

You, and each of you, will please take notice that the defendants above named will move the above entitled court, in the courtroom of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, on the 27 day of August, 1935, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the temporary injunction heretofore entered, on the grounds and for the reasons stated in said motion, copy of which is hereunto attached.

Dated: This 22 day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Received copy of above this 22nd day of August 1935 Joseph Smith & George Breslin, by George Breslin attys for pl. Filed Aug 22, 1935 R. S. Zimmerman, Clerk, By B. B. Hansen, Deputy Clerk

[Title of Court and Cause.]

MOTION TO VACATE TEMPORARY INJUNCTION

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 31st day of July, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate and complete remedy at law.

II.

That upon the basis of all the records, files and proceedceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other Purposes", approved ....., which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted but on the contrary the Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of $1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plaintiff, together with all persons similarly situated, has ad-

justed itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction appeal in cases based on similar causes of action to that set out in plaintiff's bill of complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22nd day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas
CLYDE THOMAS,
Assistant U. S. Attorney

Attorneys for Defendant.

[Endorsed]: Recd. copy of the above this 22nd day of August, 1935 Joseph Smith & Geo. M. Breslin Attys for pl. By Geo. M. Breslin

Filed Aug. 22, 1935 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 30th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Paul J. McCormick, District Judge.

STANDARD PACKING COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California; etc., Defendant.	IN EQUITY No. 698-H Minute Order on Motion to Vacate Temporary Injunction.

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction pendente lite have been submitted. All have been presented for decision because of the urgency

of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the regular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjust Act, and such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

[Title of Court and Cause.]

PETITION OF PLAINTIFF FOR REHEARING.

To the HONORABLE PAUL J. McCORMICK, Judge of the District Court of the United States, Southern District of California, Central Division:

The petition of STANDARD PACKING COMPANY, a corporation, plaintiff in the above entitled cause shows:

1. That on the 2nd day of July, 1935, plaintiff herein filed in this Court its Bill of Complaint and Petition for Declaratory Judgment and Injunction, therein alleging that the Agricultural Adjustment Act, therein described, was unconstitutional for the reasons therein shown, among which were that the processing tax provided to be levied and collected under the said Act was illegal and unenforcible; that for each month said plaintiff failed or refused to pay the processing tax payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation, would be liable every month such violation occurred to the infliction of the great and unreasonable penalties provided by the Act; that plaintiff has no plain, speedy, adequate or complete remedy at law for the recovery of any taxes paid; and that if such tax were levied against or collected or attempted to be collected from plaintiff, it would, among other results enumerated, result in irreparable loss and injury to plaintiff and in a multiplicity of suits; and therein praying for judgment declaring said Act unconstitutional and for injunction restraining the levying against or the collection or attempted collection of such processing tax from plaintiff.

2. That on the 31st day of July, 1935, said Court issued its preliminary injunction herein as prayed for in said Bill and Petition, enjoining and restraining said defendant, Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, his officers, agents, employees, etc., from levying against or collecting or attempting to collect from plaintiff any processing tax, whether then or thereafter to become payable under said Act, to be in force until the final decree of the said Court or until further order of the Court.

3. That thereafter, to-wit, on the 30th day of August, 1935, on written motion of said defendants, said Court by its minute order vacated said preliminary injunction for the reasons stated in such minute order.

4. That the following are the grounds presented and urged by plaintiff for an order of the Court granting a rehearing herein on said motion to vacate said preliminary injunction:

(a) The reason assigned by this Honorable Court for the granting of said motion vacating the preliminary injunction herein was that the decision or ruling made on or about August 15, 1935, by the United States Circuit Court of Appeals for the Ninth Circuit in the case of Fisher Flouring Mills Company v. Vierhus, individually and as Collector of Internal Revenue for the Western District of Washington, numbered 7938, and companion causes, was binding upon this Court in this cause and was so authoritative as to impel this Court to vacate the said preliminary injunction herein upon the presentation of said motion therefor; that the facts herein involved admitted by the defendants to be true and found to be true by the Court in its preliminary injunction issued herein, and

in its order therefor, are different and unlike the facts involved and considered by said Circuit Court of Appeals in the aforesaid causes before it; that the said Circuit Court of Appeals in those causes considered only the matters and facts shown it in the applications in those causes, for the opinion recognizes the rule that certain extraordinary and exceptional circumstances in a cause might render Section 3224 Revised Statutes inapplicable; and indicative of the Court's intention that it was passing upon and deciding only the facts and allegations of the particular causes before it, it is stated in the opinion of the Court: "It therefore becomes necessary for us to inquire whether the circumstances alleged by the appellants in these causes are of that extraordinary and exceptional character which, under the decisions of the Supreme Court, would justify us in disregarding or refusing to apply Section 3224"; and determines the causes before it by stating that "Under the showing made in these applications, we are not justified in disregarding the provisions of Section 3224 of the Revised Statutes, supra";

That in the application of the doctrine of stare decisis, the aforesaid decision of the said Circuit Court of Appeals is authority only upon the matters actually passed upon by the Court and directly involved in the cause, and consequently that decision is not binding upon this Court in a cause involving dissimilar points and unlike facts; and that, furthermore, under the said rule of stare decisis any expression contained in the opinion of the said Circuit Court of Appeals which is not necessary to a determination of the cause should be regarded as mere dictum and not as authority;

That in determining said causes before it, the Judges of said Circuit Court of Appeals were divided, two of the

judges thereof refusing to grant injunctive relief on appeal, while one of said judges dissented; that the dissenting opinion thus rendered was and is not the decision in the causes and is no authority whatsoever either in those causes nor in any other; nor are any of the expressions in that dissenting opinion in anywise interpretative of the majority opinion nor binding upon this Court in any manner;

That, furthermore, and in fact, the injunctive relief asked of said Circuit Court of Appeals in said causes before it was by and through an original application for that relief, whereas in the cause before this Court, this Court, found, upon mature consideration of facts dissimilar to the facts in those causes, that, if the preliminary injunction should not issue herein, there would result to the plaintiff great and irreparable loss and damage and a multiplicity of suits; and that said plaintiff had no plain, speedy, adequate and, or, complete remedy at law, and that if said plaintiff was unable to pay or refused to pay such processing tax, such plaintiff would be subject to great and unusual penalties as provided by the Act; and,

That, therefore, the matter of the applications for an injunction pending appeal before the said Circuit Court of Appeals and the matter of the motion before this Court to vacate a preliminary injunction already granted and in full force and effect, are in themselves dissimilar matters and proceedings and require different considerations and are governed by different rules and principles of law.

(b) That the dissolution of said preliminary injunction amounts to a practical denial of the relief to which plaintiff might show itself entitled on a final hearing of its complaint for injunction.

(c) That the plaintiff, being compelled by the order for preliminary injunction, and by the injunction itself, to deposit in Court monthly as it becomes due the amount of the processing tax payable by it, which order has been and will continue to be obeyed by plaintiff, the defendant Collector will suffer no loss or injury if on the final hearing of this cause the decree should be for the defendant; while, on the contrary, plaintiff will suffer great and irreparable loss and damage if such injunction be not restored, in the event this Court should render its decree in the final hearing favorable to plaintiff.

(d) That, since in the final disposition of the cause, it will be necessary to determine important questions on the issues arising in the cause herein and on which depends the right to the relief prayed for, and the preliminary injunction having been properly granted and issued in the first instance, and no fact or circumstance having been shown to have occurred subsequently thereto rendering its dissolution proper, the injunction should continue in force until the final decree herein.

(e) That there being probable cause that plaintiff will succeed in the final hearing and decree herein that said Agricultural Adjustment Act is unconstitutional and uninforcible, and there being present in this cause such extraordinary circumstances sufficient to create an exception to Section 3224 of the Revised Statutes of the United States, the preliminary injunction should continue in force; and this is especially so since the sole question before this Court for determination is whether the preliminary injunction should be continued in force.

(f) That said Agricultural Adjustment Act is unconstitutional and uninforcible in so far as the provisions

of the Act appertaining to the business of this plaintiff and the exaction of the so-called tax thereon are violative of the Constitution of the United States for the reasons stated in said bill of complaint and for injunction; and that because of the fact said plaintiff will suffer great loss and irreparable injury as well as be relegated to a great multiplicity of suits for refund if injunctive relief is not granted, said preliminary injunction should be restored to its full effectiveness.

(g) That the said so-called processing tax is not a tax for revenue purposes or for any other purpose, for which permission and authority are given by any provision of the Constitution of the United States, and, hence, the provisions of Section 3224 of said Revised Statutes do not apply.

WHEREFORE, petitioner prays that this Court grant a rehearing in the matter of said motion by defendants to vacate said preliminary injunction on such terms as this Court shall deem just; and that upon such rehearing said motion to vacate may be denied, and said preliminary injunction reinstated and restored to the full force and effect it had before said order vacating it was made; and that petitioner may have all further relief just and proper in the premises.

DATED, September 9th, 1935.

Joseph Smith and
George M. Breslin
Attorneys for Petitioner.

[Endorsed]: Received copy of the within this 9th day of Sept. 1935 Clyde Thomas, Asst. U. S. Atty, Attorney for deft. Filed Sep. 9 - 1935 R. S. Zimmerman, Clerk By Robert P. Simpson Deputy Clerk.

[Title of Court and Cause.]

ORDER

The plaintiff having filed herein its petition for rehearing of defendants' motion to vacate preliminary injunction and praying that the preliminary injunction heretofore granted be restored to full force and effect,

IT IS ORDERED that said petition for rehearing be set for hearing on the 12th day of September, 1935, at the hour of 2:00 o'clock P. M. of that day, at the Courtroom of the undersigned Judge of said District Court, Southern District of California, Central Division, in the Federal Building in Los Angeles, California, and in said District, and that notice of such hearing be given to the defendants or their attorneys not later than the 9th day of September, 1935.

DATED, Los Angeles, California, September 9th, 1935.

Paul J. McCormick
Judge.

[Endorsed]: Received copy of the within this 9th day of Sept. 1935 Clyde Thomas Asst. U. S. Atty. Filed Sep 9-1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF HEARING PETITION FOR REHEARING

To NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, defendant herein, and to his attorneys PEIRSON M. HALL, United States Attorney, and CLYDE THOMAS, Assistant United States Attorney:

YOU AND EACH OF YOU will please take notice that there has been filed herein by plaintiff its petition praying for rehearing of the motion of defendants to vacate the preliminary injunction heretofore issued herein, and for restoration of such injunction to full force and effect, a copy of which is herewith served upon you; that by order of said Court this day made, the hearing of said petition has been set for the 12th day of September, 1935, at the hour of 2:00 o'clock P. M. of that day, or as soon thereafter as counsel may be heard, before Honorable Paul J. McCormick, a Judge of said District Court, at the Courtroom presided over by him as such judge, in the Federal Building in Los Angeles, California, in said District; and that at said time and place, said plaintiff will

present to said Court and there will be heard by said Court the aforesaid petition for rehearing of said motion and for the restoration of said preliminary injunction to full force and effect.

DATED, September 9th, 1935.

Joseph Smith
George M. Breslin
Attorneys for said Plaintiff.

[Endorsed]: Received copy of the within Notice, and petition and order therein mentioned this 9th day of September, 1935 Clyde Thomas, Asst. U. S. Atty. Filed Sep. 9-1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[Title of Court and Cause.]

MOTION FOR LEAVE TO FILE SUPPLEMENT TO BILL OF COMPLAINT, etc.

Now comes STANDARD PACKING COMPANY, a corporation, the plaintiff in the above entitled cause, and moves the Court for leave to file herein a supplement to its Bill of Complaint and Petition for Declaratory Judgment and Injunction on file herein, and to each count therein contained, which supplement is herewith proffered for filing herein.

Said motion will be made and is made upon the ground that the following material facts have occurred since the filing herein by plaintiff of its original bill of complaint, etc., to-wit:

1. That on the 2nd day of July, 1935, plaintiff filed in said Court its original Bill of Complaint and Petition for Declaratory Judgment and Injunction wherein it was and is sought to have declared unconstitutional and unenforcible the Agricultural Adjustment Act, mentioned and described in said original Bill of Complaint, etc., and for injunction against said defendant Collector restraining him from collecting or attempting to collect from plaintiff the processing taxes in said Act provided to be paid by plaintiff as a processor of hogs.

2. That since the filing of said original Bill of Complaint, etc., the Congress of the United States enacted and on the 24th day of August, 1935, the President of

the United States signed and on that day there became law, certain amendments to the said Agricultural Adjustment Act, which amendments are mentioned and generally described in the proffered supplement to said Bill of Complaint; that in and by said amendments additional, different and material facts and circumstances are made to appear and exist materially affecting the causes of action, which facts and circumstances are particularly alleged and shown in said proffered supplement, and to which reference is hereby made for all particulars with the same force and effect as if here set out at length.

Said motion will be made upon all the papers and records in said cause and upon the said proffered supplement.

Said plaintiff asks said Court to fix a day for the hearing of this notice and to shorten the time of the notice of the hearing thereof as may seem reasonable.

DATED, September 12, 1935.

Joseph Smith
George M. Breslin
Attorneys for said plaintiff.

[Endorsed]: Filed Sep 12, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

ORDER

Plaintiff having presented to this Court its supplement to its Bill of Complaint and Petition for Declaratory Judgment and Injunction, and to each of the counts thereof, together with its motion for leave to file said supplement,

IT IS ORDERED that said motion be set for hearing on the 12th day of September, 1935, at the hour of two o'clock P. M. on that day, before Honorable Paul J. McCormick, Judge of the above entitled Court, at his Courtroom in the Federal Building in Los Angeles, California, in said District.

IT IS FURTHER ORDERED that notice of such hearing be given to the defendants or to their attorneys herein not later than the 12th day of September, 1935 at noon; and that in connection with said notice there be served upon said defendants or their said attorneys a copy of the said supplement proffered by plaintiff for filing herein.

DATED, September 12, 1935.

Paul J. McCormick
Judge of said District Court.

[Endorsed]: Filed Sep 12, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 12th day of September, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

STANDARD PACKING COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. COHEE, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, Defendants.	No. Eq. 698-H

These causes coming on for hearing on (1) Petitions for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases, Nos. 698-H, 708-J, 710-H, and 740-C; George M. Breslin, Esq., appearing for the plaintiffs in cases, Nos. Eq.-698-H and Eq.-708-J; Benjamin W. Shipman, Esq., appears for the plaintiff in case No. Eq.-694-C; W. Torrence Stockman, Esq., appears for the plaintiff in Case No. Eq.-710-H; John C. MacFarland, Esq., appears for the plaintiff in Case, No. Eq.-740-C; and J. E. Blum,

Esq., appearing for the plaintiffs in Cases, Nos. Eq.-702-J, Eq.-703-H, and Eq.-719-C; and Philip N. Krasne, Esq., appearing for the plaintiff in Case No. Eq.-737-M, Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock p. m. counsel answer ready in all matters; following which,

George M. Breslin, Esq., makes a statement, and

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to Motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p. m., George M. Breslin, Esq., argues to the Court in support of petitions for rehearing; after which,

At the hour of 2:30 o'clock p. m. Peirson M. Hall, Esq., argues to the Court in reply thereto.

At the hour of 3:10 o'clock p. m. John C. MacFarland, Esq., makes closing argument in behalf of the plaintiffs; following which

At the hour of 3:15 o'clock p. m., J. E. Blum, Esq., makes a statement.

The Court now renders its oral opinion and orders that each Motion for rehearing be severally denied and exceptions allowed.

Upon Motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is ordered that Supplemental Bills of Complaint in Cases, Nos. Eq.-698-H and Eq.-708-J may be amended by interlineation.

[Title of Court and Cause.]

SUPPLEMENT TO BILL OF COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION.

Now comes STANDARD PACKING COMPANY, a corporation, the plaintiff in the above entitled action and, by leave of the above entitled Court first had, files this its Supplement to its Bill of Complaint and Petition for Declaratory Judgment and Injunction on file herein, and to each count or cause of action therein contained and alleged, and respectfully alleges and represents as follows:

I.

Since the commencement of said action, to-wit, on August 14, 1935, the House of Representatives passed a Bill (H. R. 8492) entitled "A Bill to amend the Agricultural Adjustment Act, and for other purposes." On August 15, 1935, the Senate passed the said Bill. On August 24, 1935, the President signed the said Bill. Under the provisions of said Amendatory legislation it is provided, among other things:

"(a) Section 12. Subsection (b) of the Agricultural Adjustment Act, as amended, is amended to read as follows:

***

Specific Tax Rates

(2) In the case of wheat, cotton, field corn, hogs, peanuts, tobacco, paper, and jute, and (except as provided in paragraph (8) of this subsection) in the case of sugarcane

and sugar beets, the tax on the first domestic processing of the commodity generally or for any particular use, or in the production of any designated product for any designated use, shall be levied, assessed, collected, and paid at the rate prescribed by the regulations of the Secretary of Agriculture in effect on the date of the adoption of this amendment, during the period from such date to December 31, 1937, both dates inclusive."

The purported rate of tax on the first domestic processing of hogs as prescribed by the regulations of the Secretary of Agriculture in effect on the date of the adoption of said amendment was $2.25 per hundredweight, live weight. By other provisions of said amendatory Act said tax rate may be increased or decreased according to methods therein provided, but no such change has been made to the date hereof.

"(b) Section 32. The Agricultural Adjustment Act as amended ,is amended by adding after Section 20, the following new section:

Sec. 21 (a). No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Delaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or

penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Apriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

* * * *

(d) (1) No recovery, recoupment, setoff, refund or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the

adoption of this amendment under this title (including any overpayment of such tax), unless after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16 or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor

or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of Section 16, had the tax terminated by proclamation pursuant to the provisions of Section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law:

(1) No suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such

regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

* * * * *

(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

That pursuant to the provisions of said Agricultural Adjustment Act, and the proclamations and regulations issued by the Secretary of Agriculture, and regulations promulgated by the Secretary of the Treasury thereunder, the plaintiff, within the time provided by said Act and regulations, filed with said Nat Rogan, as said Collector of Internal Revenue returns for the respective months of June and July, both in 1935, showing the amount of processing tax claimed to be payable by plaintiff under the terms of said Agricultural Adjustment Act, with respect to the processing of hogs by it during the said months of June and July; that the said amounts so payable by plaintiff as disclosed in said returns, was for the said month of June, the sum of $1360.30; for the said month of July, the sum of $2251.26; that the payment of the said tax with respect to hogs processed during said month of June, 1935, became due on or before July 31, 1935, under the provisions of Articles 11 (b) and 26 (a) of Treasury Regulation 81, and the said tax for the said month of July became due on or before August 31, 1935, under said provisions of the said Regulation; that, while said plaintiff has not made its return to said Collector of the amount of hogs processed by it during the month of August, 1935, the amount of tax claimed to be payable by it under said Act on the amount of hogs processed by plaintiff during the said month of August is the sum of $2294.25, and that such last mentioned tax will become payable under said Act on or before September 30, 1935.

III.

That plaintiff has been advised by counsel and believes and therefore avers that the defendant Collector would have proceeded to collect from plaintiff, not only the processing taxes payable by plaintiff under the provisions of

said Agricultural Adjustment Act, and remaining unpaid, for the months of March, April and May, all in the year 1935, alleged in the original bill of complaint, etc., on file herein, but all other of such taxes thereafter due and payable by plaintiff under said Act, except for the issuance of the preliminary injunction heretofore issued herein, and that said defendant Collector will proceed to collect by summary process, including distraint, seizure and sale of the property of plaintiff, unless restrained from so doing.

IV.

That unless the plaintiff pays the said processing taxes, whether now existing and determined or hereafter to be determined under the provisions of said Agricultural Adjustment Act on hogs processed by it, or secures the equitable relief in said original bill of complaint, etc., and herein sought, it and its officers and agents participating in such failure or refusal of payment thereof will be subject to the great and unusual criminal penalties provided in Section 1114 (a) of the Revenue Act of 1926 (44. Stat. 116, U. S. C. Rule 26, Sec. 1265) and Section 19 (b) of the Agricultural Adjustment Act as amended, as well as will said plaintiff be subject to the great and extraordinary penalties provided by law.

V.

That plaintiff is advised by counsel, believes and therefore avers that the assessment and collection from the plaintiff of the said taxes, including those accrued before and after August 24, 1935, the date of the enactment of said amendatory Act, would be unconstitutional and illegal for the reason that the Agricultural Adjustment Act and the amendments thereto, under which said taxes respectively accrued and under which collection thereof is immi-

nent and will be attempted, violate the Constitution of the United States in the following, as well as in other particulars:

(a) The imposition of the tax of the character and for the purposes prescribed by said Agricultural Adjustment Act and the amendments thereto is not within the taxing power of Congress as defined by Article I, Section 8 of the Constitution;

(b) Said Act and the amendments thereto represent an attempt on the part of Congress to exercise powers which are reserved to the States respectively or the people by the Tenth Amendment to the Constitution;

(c) The imposition of processing taxes provided by said Act and the amendments thereto will deprive this plaintiff of its property without due process of law in violation of the Fifth Amendment to the Constitution;

(d) Said so-called taxes are not in fact or in law taxes but on the contrary are an attempted, illegal and unconstitutional exaction from plaintiff of its property without due process of law and in contravention of the aforesaid sections and amendments of the Constitution and each of them, for the benefit of a class and not to pay the debts or provide for the common defense or general welfare of the United States;

(e) The expressed purpose of the Agricultural Adjustment Act as it affects and appertains to this plaintiff is to regulate and control the production and processing of agricultural commodities, and particularly the raising and processing of hogs. Neither the raising nor the processing of hogs by the plaintiff constitutes directly or indirectly, or so affects, interstate commerce, as to vest in the Congress power to regulate such raising or pro-

cessing under the provisions of Article I, Section 8, Clause 3 of the Constitution;

(f) Said Act, as in effect prior to the 24th day of August, 1935, and as amended by the amendments approved by the President on said last mentioned date delegated and still does delegate to an administrative officer legislative powers conferred exclusively on Congress by Article I, Section 1, Article I, Section 7, and Article I, Section 8, Clause 18 of the Constitution. Section 21 (b) of the amendatory act approved August 24, 1935, which purports to legalize and ratify the so-called taxes determined, prescribed and proclaimed by the Secretary of Agriculture acting pursuant to the legislative powers thus delegated to him and to legalize and ratify the assessment, levy, collection and accrual of such taxes is invalid and ineffective;

(g) Said Act, as in effect prior to the said 24th day of August, 1935, and as amended by the amendments approved by the President on said last mentioned date, attempts to control and regulate business and commerce purely intrastate in contravention of Article I, Section 8, Clause 3 of the Constitution, as well as the Tenth Amendment thereto.

VI.

That Section 21 of the Agricultural Adjustment Act as amended purports to allow the recovery and refund of processing taxes illegally collected, upon compliance with certain conditions therein mentioned. The meaning, purport and intent of said conditions are so uncertain, vague and ambiguous as to be legally and factually impossible to determine, with the result that the remedies supposedly made available to the plaintiff by said section are not

plain, adequate or complete. By reason of the uncertainty, vagueness and ambiguity of the meaning, purport and intent of said conditions and restrictions upon the plaintiff's legal remedy the plaintiff is entitled to the equitable relief herein sought.

VII.

That the legal remedy which said Section 21 of the Agricultural Adjustment Act as amended purports to allow is neither plain, adequate nor complete for the following additional reasons:

(a) Under paragraph (d) of said Section 21, plaintiff will be precluded from securing refunds of any taxes heretofore or hereafter paid by it, even though such taxes are unconstitutional or invalid, unless the plaintiff establishes that it has not, either directly or indirectly, included the amount of such tax in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner. As a first domestic processor of a basic agricultural commodity (hogs), plaintiff is made liable in the first instance for the prescribed processing taxes and is required to pay said taxes out of its own funds. When paid by plaintiff, said taxes become part of the cost to it of the product which it ultimately sells to its customers. Said taxes, however, are imposed upon the first domestic processing of hogs, rather than upon the sale of the articles resulting from such processing. In the business of plaintiff, to-wit, the processing of hogs, the processing tax is levied upon the live weight of the hogs at the present rate of $2.25 per hundredweight. In such processing of hogs by plaintiff not more than

seventy-five per cent of said live hogs is usuable and sold by plaintiff in its said business, and such part of said hogs so usable and so sold in said business is divided into numerous and separate portions and products, including ham, sausage, bacon, lard, loin, hocks, feet, heads, shoulders, trimmings, casings, neck, tails and other portions; some of which said products are pickled and others smoked, and yet others of which go through sundry other processes, and some are sold as fresh meat. It would be and is virtually impossible to allocate the proportional part of said processing tax so levied on the live weight of the hog before processing to each of said portions and products thereof after processing; and further it is impossible to earmark and follow the different products of each hog after processing or to show or establish the cost of each of said various products therefrom or the sale price thereof for the reason that these various portions of many hogs so processed are, of necessity in said business, co-mingled and stored together until a sale of some portion of such co-mingled products is available and different products aforesaid are necessarily marketed at different times and at greatly varied prices, and because of which it is factually impossible to determine the sale price of the products of any one dressed hog as a whole.

Furthermore, plaintiff sells the products processed from hogs on the open market and in competition with other processors over the State of California, as well as other processors, who ship into and sell in said state like pork products. In the sale of such products plaintiff has not and does not add or include the processing tax as a separate item on its invoices. As a practical matter plaintiff would be precluded from doing so by its inability accurately to allocate any particular part of the tax to any

particular product or quantity thereof, and by the heavy penalties imposed by Section 20 of the Agricultural Adjustment Act, as amended, upon misstatements of the amount of tax allocated to any particular product.

Plaintiff avers, however, that it has been unable to pass all of said processing tax on to the ultimate consumer for the reasons alleged in its original bill of complaint, etc., and that the result of the operation and enforcement of said Agricultural Adjustment Act has been to cause and is causing plaintiff great inconvenience, embarrassment, loss and damage.

Due to economic and competitive conditions prevailing from time to time in the markets in which plaintiff buys hogs and sells the products therefrom, and to the perishable character of plaintiff's products, by reason of which it is upon occasions forced to make immediate and disadvantageous sales, it sometimes sells its said products at a loss and sometimes at a profit, and will necessarily continue to do so. Said Section 21(d) does not provide whether the price received by the plaintiff upon the sale of one of its products is to be allocated first to the full reimbursement of the processing tax payable by plaintiff, or first to the full reimbursement to plaintiff of its costs other than said taxes, or pro rata to all of plaintiff's costs. In the ordinary course of plaintiff's business it would be absolutely impossible to establish in the case of any particular portion or quantity of said products whether the tax with respect thereto was or was not passed on by plaintiff to its customers, and in particular it would be impossible to establish that any definite and ascertainable part of such tax was or was not so passed on. The assumption that a particular pork product, or any specified quantity thereof bears any

particular part of the tax is wholly arbitrary and is not susceptible of proof. Moreover, it cannot be ascertained with certainty, in respect of any particular sale of one of plaintiff's products, whether such sale resulted in a profit or a loss. Plaintiff's profit and loss experience can only be determined as the net result of its business over a substantial period of time. Thus the condition that plaintiff establish that no part of the amount of its tax has been passed on in any manner is one impossible of fulfillment with respect to any specific tax payment.

(b) In order to recover any processing taxes, if hereafter paid by it, plaintiff will be required to show under Section 21(d) of said Act as amended that the price paid by it for the hogs processed by plaintiff was not reduced by the amount of such processing tax. Plaintiff in the past has paid and for the future necessarily will pay for its purchases the competitive open market prices in effect at the time thereof. The market price of such commodity is, has been and will continue to be a fluctuating price depending upon market conditions in respect of supply, demand, costs of production, competition and other factors prevailing from time to time. The processing tax payable by plaintiff with respect to any hogs which it buys is only one of many factors affecting the market price of such commodity at any given time. The effect of such single processing tax factor upon the market price of hogs can at no time be isolated and determined. It is not possible for the plaintiff to show in respect of any purchase whether, or to what extent, the market price thereof was affected by said tax.

(c) The fact of such passing on of the said tax to the vendee or passing back of the said tax to the vendor

is not a fact that is merely difficult of ascertainment. It is a fact that it is impossible to determine, as herein alleged. Any attempt to define it is speculative and imaginary. By reason of the fact that plaintiff's right to receive a refund of taxes paid by it is limited by said requirement that it shall establish facts not susceptible of proof, said remedy is wholly illusory, unreasonable, fictitious and is not a plain, adequate and complete remedy at law, and is no remedy at all.

(d) Said Section 21(d) is susceptible of the construction that if any part of the processing tax has been deducted from the price paid by the plaintiff for its hogs or added to the price received by the plaintiff for its products processed from hogs, then the entire right to recover the tax is taken away, even if the amount so deducted from the price paid by the plaintiff for the hogs or so added to the price received by the plaintiff from its dressed products is but a small part of the total tax. So construed said section is arbitrary and unreasonable and in practical effect denies to the plaintiff all right to recover such portion of the processing tax, the burden of which was actually borne by it, all in violation of the said Fifth Amendment.

(e) The above conditions imposed upon the right of the plaintiff to recover taxes paid by it must, under said Section 21(d) be established to the satisfaction of the Commissioner of Internal Revenue, and apparently his determination regarding the existence of such conditions is not subject to judicial review. The transcript of the hearing before the Commissioner of Internal Revenue is the sole record of the case on appeal to the courts. The effect of said section is therefore to limit the function of the judicial review to the determination of whether there

was any evidence submitted to the Commissioner of Internal Revenue tending to support the findings of the Commissioner. Thus construed said Section 21(d) deprives the plaintiff of its property without due process of law in violation of the Fifth Amendment aforesaid.

VIII.

Under said Section 21(d) of said Agricultural Adjustment Act as amended, if the processing tax has been either passed on or passed back by the plaintiff, then the plaintiff cannot maintain any action to recover the tax, if it is ultimately determined to be invalid, either for its own account or for the account of the persons to whom the processing tax has been thus passed on or passed back by the plaintiff; nor can the persons to whom the processing tax has been thus passed on or passed back maintain such an action on their own account, but all right of action by anyone to recover the tax, if it has been passed on or passed back, has been wholly taken away by said amendments to said Agricultural Adjustment Act. Moreover, Section 21(a) of said Act and Section 405 of the Revenue Act of 1935 deprive the courts of power to render declaratory judgments with respect to such alleged taxes. By reason of the impossibilities of proof hereinabove referred to, the practical effect of said Acts will be to deny taxpayers all means of securing a judicial decision as to the constitutionality of the processing taxes, unless this court grants the relief herein sought.

IX.

Plaintiff's food products processed from hogs have been and are sold in close and active competition with foods not subject directly or indirectly to a processing

tax. The necessary result has been and is to greatly restrict, narrow and limit the market for plaintiff's products as compared with the available market if no processing tax had existed, and to alienate both past and prospective purchasers of plaintiff's products processed from hogs, and to greatly decrease and limit plaintiff's trade and profit possibilities, and the collection and enforcement of said unconstitutional and invalid tax is thus detrimental and prejudicial to plaintiff even though the tax or some portion thereof may be ultimately refunded.

X.

That if said plaintiff does not pay said illegal taxes, or any thereof, and injunctive relief be not afforded it herein, then under said Agricultural Adjustment Act and the Revenue laws of the United States, including the regulations promulgated by the Secretary of the Treasury, said Collector, his deputies and agents, may and will levy upon, distrain, seize and sell the plant, stock on hand, merchandise and other property of plaintiff in collection of such unpaid taxes; and every such distraint and seizure will result in a separate and different trespass against plaintiff's property, and will constitute various and different breaches of the peace; that plaintiff has been advised by its counsel and believes and therefore avers that said defendant Collector, his deputies and agents, so engaging in said various trespasses are and will be, and each of them is and will be, wholly unable to answer to plaintiff for the injury and damage thus occasioned plaintiff; and that by reason of such distraint, seizure and sale of plaintiff's property, its said property and the good will of its said business will be rendered of no value and render plaintiff unable to recover its aforesaid loss and damage, thus taking the property of

plaintiff without due process of law, and result in a multiplicity of suits, and deny to plaintiff a plain, speedy, adequate and complete remedy at law.

XI.

To require plaintiff to pay said invalid and unlawful processing tax without affording it an adequate remedy at law for the recovery thereof, and at the same time to forbid that any suit shall be maintained to enjoin the collection of such processing taxes will result in taking plaintiff's property for private use and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

XII.

Plaintiff has been advised by its counsel and verily believes and therefore avers that the said Agricultural Adjustment Act, as amended, violates the Constitution in the particulars hereinbefore set forth. It is challenging the constitutionality of said Act and the legality of the processing taxes imposed thereby in good faith. The imposition against plaintiff of the penalties provided by law for failure to pay said taxes, including the alleged interest of 1 per cent a month (Revenue Act of 1926, Sec. 626, 47 Stat. 69) during the pendency of this litigation, which is brought to test the constitutionality of said Act and the legality of the taxes imposed thereby, would deprive the plaintiff of its property without due process of law even if the plaintiff's claims in this action should ultimately be held to be unfounded.

XIII.

Plaintiff has no plain, adequate and complete remedy at law in the premises in that there is no appropriation of funds by Congress now available, or now provided to be available in the future, sufficient in amount to permit the refund to the plaintiff and other processors, of processing taxes in the event such taxes should hereafter be paid and said Agricultural Adjustment Act as amended is and shall be declared invalid. While said Act as amended purports to appropriate money for the purpose, among others, of making refunds of processing taxes paid, the amount of the appropriation available for that purpose is only that portion of the taxes collected under said Act which is not otherwise expended for rental and benefit payments, payments authorized to be made under section 8 of the Agricultural Adjustment Act as amended and administrative expenses.

XIV.

That the so-called remedy at law afforded plaintiff by the Act is dubious, unfounded and uncertain, and the uncertainty respecting the ability of plaintiff to satisfy its claim for refund if it attempts to pursue any remedy at law given it, entitles plaintiff to injunctive relief herein.

XV.

That said plaintiff has paid into court all processing taxes heretofore becoming due and payable by plaintiff under said Act, in conformity with the Court's order in that respect made herein, and if required by said Court will continue to pay into Court, and hereby offers to pay into said Court all other processing taxes payable by it at the time and as often as such taxes become due and payable by plaintiff; and that such taxes so paid into said

Court by plaintiff are to be paid to the Collector of said Sixth District of California if and when it is finally determined that the collection of said taxes from said plaintiff is not illegal and unconstitutional.

XVI.

That the purported taxes on account of hogs processed by plaintiff during the months subsequent to July and August, 1935, will fall due and become payable from time to time during the pendency of this action, and each and all of the allegations hereof with respect to the taxes payable by plaintiff on account of hogs heretofore processed by plaintiff are and will be equally applicable to the taxes payable by plaintiff on account of hogs heretofore processed by plaintiff; and unless plaintiff pays the said taxes for hogs processed in subsequent months monthly as they become due under the terms of said Agricultural Adjustment Act as amended, said defendant Collector will proceed to enforce collection of the same in the manner hereinbefore set forth and plaintiff will be subjected to the same consequences of failure to pay such taxes as are herein alleged and set forth with respect to the taxes on account of hogs heretofore processed by plaintiff, all of which will result in a multiplicity of civil actions and criminal prosecutions, to the great and irreparable injury of the plaintiff and to its business in the same manner and to the same extent set forth in said original bill of complaint, etc., and as hereinbefore set forth with respect to said taxes on account of hogs heretofore processed by plaintiff.

WHEREFORE, plaintiff prays:

First: That it may have all the relief prayed for in its original Bill of Complaint and Petition for Declaratory Judgment and Injunction on file herein;

Second: That a temporary restraining order may be issued against the defendant, Nat Rogan, and each of his officers, agents, attorneys and deputies, restraining them from collecting or attempting to collect said taxes from the plaintiff, whether now due and payable or hereafter to become due and payable under said Act and the amendments thereto, and whether by distraint, levy, posting of notices of liens, jeopardy assessment, or in any other manner, pending hearing on the prayer for a temporary injunction;

Third: That the defendant, Nat Rogan, and each of his officers, agents, attorneys and deputies, be enjoined temporarily until final hearing and permanently thereafter from collecting or attempting to collect in any manner from the plaintiff said taxes;

Fourth: That this Court declare said amendments to said Agricultural Adjustment Act and said Act as amended are unconstitutional and uninforcible, and that the said processing taxes are illegal and unconstitutional in the respects and for the reasons in said original bill of complaint, etc., and herein alleged and shown, and that the collection thereof from plaintiff would be violative of its constitutional rights;

Fifth: And for such other and further relief as to justice and equity may pertain, and for its costs.

JOSEPH SMITH and
GEORGE M. BRESLIN
Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

T. P. BRESLIN being first duly sworn according to law deposes and says: That he is the president of the Standard Packing Company, a corporation, the plaintiff named in the foregoing supplement to bill of complaint and petition for declaratory judgment and injunction; that he has read said supplement to bill of complaint and petition for declaratory judgment and injunction and knows the contents thereof, and that the statements made therein are true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true; and that he is authorized to make and does make this verification for and on behalf of said corporation.

T. P. BRESLIN

Subscribed and sworn to before me this 12th day of September, 1935.

(Notarial Seal) G. STUART SILLIMAN
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sept 12 1935 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL

To the HONORABLE PAUL J. McCORMICK, Judge of the District Court of the United States, Southern District of California, Central Division:

STANDARD PACKING COMPANY, a corporation, your petitioner, who is the plaintiff in the above entitled cause, considering itself aggrieved by the order of said Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in said cause, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and prays that this appeal may be allowed, and that pursuant thereto citation issue as provided by law, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, all to the end that the errors complained of may be corrected.

Petitioner tenders bond in such amount as this Honorable Court may require of it in order to perfect its appeal.

And desiring to supersede the execution of the said order or decree, petitioner tenders bond in such amount as the Court may require for such purpose; and prays that

with the allowance of the appeal herein a supersedeas be issued staying the dissolution of said preliminary injunction pending appeal, and restoring such injunction during the pendency of such appeal.

DATED, September 14th, 1935.

Joseph Smith and
George M. Breslin

Attorneys for Plaintiff.

[Endorsed]: Received copy of the within this 14th day of Sept 1935 Clyde Thomas Asst U. S. Atty.

Filed Sept 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

STANDARD PACKING COMPANY, a corporation, Plaintiff vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. COHEE, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, Defendants	No. Eq. 698-H IN EQUITY ASSIGNMENT OF ERRORS

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

Now comes the plaintiff, STANDARD PACKING COMPANY, a corporation, and files the following assignment of errors upon which plaintiff will rely in the prosecution of the appeal from the order of the above entitled Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in the above entitled cause:

I.

The Court erred in granting defendants' motion to vacate said preliminary or temporary injunction.

II.

The Court erred in making its order vacating such preliminary or temporary injunction.

III.

The Court erred in holding that plaintiff's bill of complaint and petition for declaratory judgment and injunction did not state facts sufficient to justify injunctive relief to plaintiff.

IV.

The Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the case of Fisher Flouring Mills Company v. Collector, and cases consolidated therewith, decided August 15, 1935, was binding upon the above entitled District Court and required the granting of the motion to vacate said preliminary injunction irrespective of the facts alleged in plaintiff's bill of complaint and petition for declaratory judgment and injunction, admitted by the defendants to be true, and which facts are wholly different and unlike the facts involved in the said Fisher Flouring Mills Company v. Collector and consolidated cases.

V.

The Court erred in holding that the said decision of the United States Circuit Court of Appeals for the Ninth Circuit required the granting of the motion to vacate the said preliminary injunction.

VI.

The Court erred in holding that the plaintiff was not entitled to any equitable or injunctive relief.

VII.

The Court erred in holding that plaintiff was not entitled to the preliminary injunction.

VIII.

The Court erred in holding that the plaintiff has a plain, speedy, adequate and complete remedy at law.

IX.

The Court erred in holding that the dissolution of the preliminary injunction heretofore granted by the Court will not result in a multiplicity of suits.

X.

The Court erred in holding that the dissolution of said preliminary injunction would not result in great and irreparable loss and damage to plaintiff.

XI.

The Court erred in holding that the dissolution of the preliminary injunction would not subject plaintiff and its officers and agents to heavy, extraordinary and inequitable penalties, both of a criminal and civil nature.

XII.

The Court erred in holding the Court was without jurisdiction to restrain or enjoin the collection of the processing taxes involved in this cause.

XIII.

The Court erred in holding that Section 3224 of the Revised Statutes of the United States prohibited the maintaining in any Court and particularly in the said District Court, of a suit for the purpose of restraining the assessment or collection of a Federal tax, and particularly said processing taxes assessed against plaintiff under the Agricultural Adjustment Act involved in this cause.

XIV.

The Court erred in holding that since the preliminary injunction was entered, the grounds alleged by plaintiff, and upon which such injunction was granted, were at the time of the dissolution of said injunction no longer in existence, because of the adoption by the Congress of H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other purposes, approved August 24, 1935".

XV.

The Court erred in holding that the preliminary injunction in this cause was granted on the basis that the bill amending said Act as originally passed by the House of Representatives denied the right to litigate the legality of processing taxes in actions at law.

XVI.

The Court erred in holding that the plaintiff was guilty of laches in bringing its action herein in that it paid the said processing tax each month for a period of a year and

a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of such tax.

XVII.

The Court erred in holding that the immediate stopping of the collection of said tax by said injunction would greatly embarrass the Government in its financial arrangements in reference thereto.

WHEREFORE, plaintiff prays that the said order vacating and dissolving said preliminary injunction be reversed and set aside, and that the said Circuit Court of Appeals for the Ninth Circuit render a proper order and decree in said cause; that such preliminary injunction be restored to its full force and effect as though the same had not been vacated; and that plaintiff may have such other and further relief as to the Court may seem just and proper in the premises.

DATED, September 14th, 1935.

JOSEPH SMITH and
GEORGE M. BRESLIN
Attorneys for said plaintiff and Appellant.

[Endorsed]: Received copy of the within this 14th day of Sept., 1935. Clyde Thomas, Attorney for Asst. U. S. Atty.

Filed Sept. 14, 1935. R. S. Zimmerman, clerk; by Edmund L. Smith, deputy clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On motion of JOSEPH SMITH and GEORGE M. BRESLIN, attorneys for Standard Packing Company, a corporation, said plaintiff.

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of said District Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in said cause, be and the same is hereby allowed; and that a certified transcript of the record, proceedings and documents herein be transmitted to said Circuit Court of Appeals for the Ninth Circuit in the manner and as required by law and the rules of said Circuit Court of Appeals.

In view of the recent action of said Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for the granting of injunctions pending appeal to such Circuit Court in other causes involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the preliminary injunction so dissolved

by order of this Court be restored to full force and effect during the pendency of this appeal, should be sought by plaintiff by application to the United States Circuit Court of Appeals for the Ninth Circuit for injunction pending appeal, if the plaintiff desires so to do.

IT IS FURTHER ORDERED that the cost bond on appeal be fixed at the sum of $250.00.

DATED, September 14th, 1935.

Paul J. McCormick
Judge of said District Court.

[Endorsed]: Received copy of the within this 14 day of Sept., 1935. Clyde Thomas, Asst. U. S. Atty.

Filed Sept. 14, 1935. R. S. Zimmerman, clerk; by Edmund L. Smith, deputy clerk.

[Title of Court and Cause.]

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, defendants in the above entitled case, in the penal sum of Two hundred fifty and 00/100 - - ($250.00) - - Dollars, to be paid to the said defendants, their successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that Whereas Standard Packing Company, a corporation, plaintiff, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Order made and entered on August 30th, 1935, granting defendants' motion to vacate a preliminary injunction by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

NOW, THEREFORE, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 16th day of September, 1935.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal] By D. M. Ladd

Attorney in Fact

Attest Theresa Fitzgibbons

Agent

Examined and recommended for approval as provided in Rule 28.

Joseph Smith and George M. Breslin

Attorneys

Approved this 16th day of September, 1935.

Paul J. McCormick

District Judge

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

On this 16th day of September, 1935, before me, S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent respectively.

[Seal] S. M. Smith,
Notary Public in and for the State of California,
County of Los Angeles.

My Commission Expires February 18, 1933.

[Endorsed]: Filed Sep. 16, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE

TO PIERSON M. HALL, United States Attorney, and CLYDE THOMAS, Assistant United States Attorney:

Please take notice that on the 14th day of September, 1935, we filed with the Clerk of the above entitled Court a praecipe designating the portions of the record to be authenticated and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal taken in the above cause, a copy of which praecipe is hereto annexed and herewith served upon you.

DATED, this 14th day of September, 1935.

Joseph Smith
George M. Breslin
Attorneys for said Plaintiff.

Service of a copy of the foregoing notice and copy of the praecipe admitted this 14th day of September, 1935.

Peirson M. Hall
United States Attorney
By Clyde Thomas
Assistant United States Attorney

[Endorsed]: Filed Sep. 14, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the Clerk in preparing the record on appeal may omit all headings, titles and all notations other than admissions of service and the filings.

DATED this 16th day of September, 1935.

Peirson M. Hall
PEIRSON M. HALL
UNITED STATES ATTORNEY

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney

Joseph Smith
George M. Breslin
GEORGE M. BRESLIN
Attorneys for Defendants.

[Endorsed]: Filed Sep. 16, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, Southern District of California, Central Division:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

1. Bill of Complaint and Petition for Declaratory Judgment and Injunction;

2. Supplement to Bill of Complaint and Petition for Declaratory Judgment and Injunction, and to each count thereof;

3. Motion for Leave to File Supplement to Bill of Complaint, etc.;

4. Order fixing time of hearing said Motion to File Supplement to Bill of Complaint, etc.;

5. Minute Order of Court allowing the filing of Supplement to Bill of Complaint and Petition for Declaratory Judgment and Injunction and to each count thereof;

6. Motion for preliminary injunction and for temporary injunction without notice;

7. Order to Show Cause and Temporary Restraining Order;

8. Objections to the granting of a preliminary injunction, filed by the United States Attorney;

9. Motion to dismiss, filed by the United States Attorney;

10. Memorandum of conclusions, made by the above entitled Court upon granting the preliminary injunction herein;

11. Minute order of said Court granting said preliminary injunction;

12. Amendment made by said Court to said minute order;

13. Preliminary injunction;

14. Motion to vacate temporary injunction filed by the United States Attorney;

15. Notice of motion to vacate temporary injunction filed by the United States Attorney;

16. Minute order made by the above entitled court on motion to vacate temporary injunction, which order vacated and dissolved such injunction;

17. Petition of plaintiff for Rehearing;

18. Order setting the hearing of said petition for rehearing;

19. Notice of hearing said petition for rehearing;

20. Minute order or orders made by said Court denying petition for rehearing.

21. Petition for appeal;

22. Assignment of errors;

23. Order allowing appeal and fixing bond;

24. Cost bond on appeal;

25. Citation on appeal;

26. This praecipe for transcript of record.

27. Notice of filing praecipe; and,

28. Clerk's certificate.

Said transcript to be prepared, authenticated and transmitted as herein requested as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before the 14th day of October, 1935.

DATED, September 14th, 1935.

Joseph Smith
George M. Breslin
Attorneys for said plaintiff.

Approved
Clyde Thomas
Asst. U. S. Atty

[Endorsed]: Received copy of the within..... this 14th day of Sept 1935 Clyde Thomas Asst. U. S. Atty Filed Sep 14, 1935 R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 144 pages, numbered from 1 to 144, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; motion for preliminary injunction and temporary restraining order; objections to the granting of a preliminary injunction; motion to dismiss; memorandum of conclusions filed July 27, 1935; minute order of July 27, 1935, granting preliminary injunction; amendment to minute order of July 27, 1935; preliminary injunction; notice of motion and motion to vacate temporary injunction; minute order of August 30, 1935, granting motion to vacate temporary injunction; petition for rehearing; order setting petition for rehearing for hearing; notice of hearing petition for rehearing; motion for leave to file supplement to bill of complaint; order setting hearing for motion to file supplement to bill of complaint; minute order allowing supplement to bill of complaint to be filed, etc.; supplement to bill of complaint; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal; notice of filing praecipe; stipulation re printing record on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Standard Packing Company, a corporation, *Appellant,* *vs.* Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, *Appellee.*	In Equity.

PETITION FOR SUPERSEDEAS AND TEMPORARY INJUNCTION.

JOSEPH SMITH,
GEO. M. BRESLIN,
Citizens Nat. Bk. Bldg., 453 S. Spring St., L. A.,
Attorneys for said Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Standard Packing Company, a corporation, *Appellant,* *vs.* Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, *Appellee.*	In Equity.

PETITION FOR SUPERSEDEAS AND TEMPORARY INJUNCTION.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the Standard Packing Company, a corporation, the appellant herein, and makes its application for supersedeas and temporary injunction, and in support thereof respectfully represents and states to the Court as follows:

I.

That on the 2nd day of July, 1935, said appellant filed in equity in the District Court of the United States,

Southern District of California, Central Division, its bill of complaint and petition for declaratory judgment and injunction, entitled "Standard Packing Company, a corporation, plaintiff, vs. Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, defendants", numbered 698-H in equity in the records of said District Court; that a subpoena or summons was on said day issued out of said District Court, and on that day duly served upon said defendants; that a copy of said bill of complaint and petition is marked "Exhibit A", attached hereto, hereby referred to and by such reference made a part hereof.

That on the 2nd day of July, 1935, the Honorable Harry A. Hollzer, one of the judges of said District Court, upon application therefor, issued an order to show cause and temporary restraining order, directed to said defendant, Nat Rogan, Individually and as Revenue Collector for the Sixth District of California, wherein said defendant was ordered to appear before said District Court at a time and place therein specified to show cause, if any there may be, why the preliminary injunction prayed for in said bill of complaint and petition should not issue, and wherein additionally said defendant Collector was temporarily restrained,

(1) From assessing or attempting to assess against, or collecting or attempting to collect from plaintiff, under

the Agricultural Adjustment Act, mentioned and described in plaintiff's bill of complaint and petition on file herein, the processing tax therein provided to be assessed against and collected from plaintiff on processing of hogs by it, whether such collecting or attempt to collect such tax be by distraint, levy, sale and, or action at law or in equity;

(2) From collecting or attempting to collect said processing tax from said plaintiff in any other manner;

(3) From imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the nonpayment of said processing tax;

(4) From enforcing or attempting to enforce any penalties against the plaintiff for the nonpayment of said processing tax; and,

(5) From enforcing or attempting to enforce any of the provisions of said Act applicable to plaintiff in relation to said processing tax;

And said order to show cause and restraining order was duly served upon said defendant Collector.

That a copy of said order to show cause and temporary restraining order is marked "Exhibit B", attached hereto, hereby referred to and by such reference made a part hereof.

That on the 12th day of July, 1935, said order to show cause came on for hearing before said District Court and the said judge thereof, together with a motion to dismiss the said bill of complaint and petition, and objections to

the granting of the preliminary injunction, theretofore filed in the cause by said defendant; that after said matters were taken under submission and consideration by the Court said motion to dismiss the bill was by the Court denied, the said objections overruled, and the said preliminary injunction ordered issued; and thereupon, to-wit, on the 31st day of July, 1935, said District Court issued against said defendant Collector in said cause a preliminary injunction, wherein said Court made its findings therein contained, wherein and whereby said defendant Nat Rogan, both individually and as said Collector was enjoined from (1) imposing, levying, assessing, demanding or collecting from plaintiff, or attempting to do so, any processing tax, interest and, or, penalties, now due or thereafter to become due from plaintiff under the said Act, on account of plaintiff's failure to pay the same or any part thereof; (2) imposing or filing, or giving notice of intention to impose or file any lien upon any of plaintiff's property because of a failure to pay said tax, then due or thereafter to become due from plaintiff; (3) levying upon, distraining or selling plaintiff's slaughtering house, packing plant, and its other property therein described, on account of such non-payment of such tax; such preliminary injunction to be in force until the final decree of the court in this case, or until further order of the court.

It was further provided in and by said preliminary injunction that such injunction was granted upon the condition that the plaintiff furnish security to the defendant

Collector by undertaking with sufficient sureties to be approved by the Court in the penal sum of $25,000.00, conditioned that plaintiff pay all said taxes and costs in the event it is finally decided said preliminary injunction was improperly issued or this action was dismissed; it being provided therein, however, that in lieu of such undertaking, plaintiff should have the option of depositing said sum of $25,000.00 with the clerk of said District Court, subject to like conditions, and upon the further condition that plaintiff shall continue to file with the defendant Collector monthly returns on all hogs processed by it as required by the Act; that plaintiff exercised the said option given to it and made deposit with said clerk of Court of said sum, subject to said conditions, and in all other respects has observed and performed the said orders of said Court; and that such preliminary injunction remained in full force and effect until the order dissolving the same was made by said District Court, from which order the appeal herein is taken.

That a copy of the minute order granting said preliminary injunction and preliminary injunction are marked "Exhibit C", attached hereto, hereby referred to and by such reference made a part hereof.

II.

That thereafter, to-wit, on or about the 22nd day of August, 1935, said defendant served and filed a motion to vacate the said temporary injunction, in words and figures as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

STANDARD PACKING COMPANY, a corporation,	)	
Plaintiff,	)	No. Eq. 698-H
vs.	)	
NAT ROGAN, etc., et al,	)	
Defendants.	)	

MOTION TO VACATE TEMPORARY INJUNCTION

To the Honorable Paul J. McCormick, Judge of the Above Entitled Court:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 31st day of July, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief *pendente lite* in this cause.

3. Complainant has a plain, adequate and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief *pendente lite.*

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that Congress has enacted H. R. 8492, entitled 'An Act to Amend the Agricultural Adjustment Act, and for other Purposes', approved ....., which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary the Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of $1,000,000,-000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plaintiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered heerin the Circuit Court of Appeals for the Ninth Circuit has denied an injunction appeal in cases based on similar causes of action to that set out in plaintiff's bill of complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22nd day of August, 1935.

PEIRSON M. HALL,
United States Attorney
CLYDE THOMAS,
Assistant U. S. Attorney
Attorneys for Defendant."

And noticed the hearing thereof before Honorable Paul J. McCormick, one of the Judges of said District Court.

That on the 30th day of August, 1935, and upon the hearing of such motion the said judge of said Court made his minute order vacating said injunction, such minute order being as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Honorable PAUL J. McCORMICK, Judge

STANDARD PACKING COMPANY, a corporation,	)	
Plaintiff,	)	IN EQUITY
vs.	)	No. 698-H
NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California; etc.,	)	
Defendant.	)	

MINUTE ORDER ON MOTION TO VACATE TEMPORARY INJUNCTION

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argu-

ment before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction *pendente lite* have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the rgular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of

Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the motion to vacate the preliimnary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

Dated:

August 30, 1935."

And that said plaintiff duly excepted to said order vacating said injunction.

VI.

That on the 14th day of September, 1935, said plaintiff petitioned said Court, addressing the same to said Judge McCormick, to allow an appeal to said Circuit Court of Appeals for the Ninth Circuit, from the said order vacating said injunction, a copy thereof being marked "Exhibit D" attached hereto and by reference made a part hereof.

And that said petition was accompanied by plaintiff's assignment of errors herein, a copy of which is marked "Exhibit E", attached hereto, hereby referred to and by such reference made a part hereof.

That on said day said Court, through and by said Judge McCormick, made its order allowing said appeal, and that a true copy of said order is marked "Exhibit F", attached hereto, hereby referred to and by such reference made a part hereof.

And that said Court issued its citation on appeal in the manner and form required by law.

That all of the foregoing papers on appeal were duly served upon the attorneys for defendants and filed with the clerk of said District Court, as well as did plaintiff file with the clerk a praecipe for transcript of all of the papers necessary on this appeal, therein naming them, and gave defendants' attorneys notice thereof; that the printing of said record on appeal is now being had under the order of said clerk; that by the order allowing said appeal said court fixed the bond on appeal at the sum of $250.00, and such bond has been furnished, approved by the Court, and filed in said cause.

VII.

That prior to presenting its said petition for appeal herein, said plaintiff, after giving proper notice of its application for leave so to do, and after obtaining leave of court to file in said cause its supplement to its bill of complaint and petition for declaratory judgment and injunction, and to each of the counts thereof, filed herein its supplement thereto; and that a copy of such supplement is marked "Exhibit G", attached hereto, hereby referred to and by such reference made a part hereof.

VIII.

That among other allegations found in said bill of complaint and petition for declaratory judgment and injunction, it is alleged and shown in substance as follows:

In First Cause of Action therein:

Paragraph I. That the plaintiff is a corporation, organized under the laws of the state of California, with its office and place of business in Vernon, Los Angeles county,

and that its business is, among other things, that of slaughtering hogs and packing, curing and selling pork and all hog products.

Paragraph II. That defendant Nat Rogan is the collector of Internal Revenue for the Sixth District of California, etc.

Paragraph III. Defines the boundaries of the Sixth Collection District.

Paragraph IV. That the matter in controversy exceeds $3000.00 exclusive of interest and costs, and exists and arises under the constitution and laws of the United States of America.

Paragraph V. That the plaintiff has been engaged for nearly twenty-two years in pork packing and has developed a valuable trade and good will; that plaintiff has not been and is not engaged in any degree in interstate commerce; that its business does not obstruct or interfere with interstate commerce.

Paragraph VI. That the Agricultural Adjustment Act was adopted May 12, 1933 and that copies of the relevant sections are set forth as an exhibit to the bill of complaint.

That the Act provides for the assessment of a processing tax in accordance with a formula therein contained, by the Secretary of Agriculture, and that he is to determine the measure or amount of such tax, determine the circumstances under which the tax becomes payable; and that under the Act processing taxes have been assessed against plaintiff in ruinous amounts; and that the Secretary of Agriculture has, since January 1, 1935, ignored the formula, and has assessed and is continuing to assess such tax in disregard of such Act; that the tax is illegal

and void; that the tax is in violation of the Constitution of the United States; and that the plaintiff being threatened with ruinous penalties for non-payment of the tax and the destruction of its business and good will, seeks the relief in equity prayed for.

Paragraph VII. That although the provisions of the Act apply to a variety of commodities, including hogs, the complaint deals only with one commodity, to-wit, hogs; that the object of the Congress, as declared in the Act is the restoration of a pre-war standard of values of hogs in terms of power to purchase such articles as farmers buy, through the control of the productions of hogs and the resultant scarcity thereof; and to obtain the consent of the producer of hogs to make such reduction, such sums of money are paid to him to justify his foregoing normal production.

That in order to acquire this money paid to not only the producer of hogs, but to producers of all other commodities, who enter into such reduction agreements, the Secretary of Agriculture levies and collects from the processors of those commodities, including plaintiff in the processing of hogs, the aforesaid processing tax;

That the statutory formula for determining the rate of tax shall be the difference between the current average farm price for hogs and their fair exchange value determined as above; and that this tax is levied on the live weight of the hog; and that neither the levy of the tax nor the determination of the amount bear any relation to the actual processing of the hogs;

That the Secretary has power to bring under the Act other commodities not named in the Act;

That the Act places in the hands of the Secretary of Agriculture effective and complete control not only of the production of all agricultural commodities and the price for which they are to be sold, but to give him equal control over the private business of those handling those commodities; and that the defendant Collector will continue to levy and collect said processing tax until and unless the Act is adjudged unconstitutional or until he is enjoined from such collection.

Paragraph VIII. That under the terms of the Act, the Secretary of Agriculture proclaimed a processing tax on hogs to become effective November 5, 1933, at a rate then fixed; and that in March, 1934, the rate was increased and fixed at $2.25 per hundredweight, live weight, and such rate remained thereafter unchanged.

Paragraph IX. That under the Act processing taxes are assessed and collected on the first domestic processing of hogs and are required to be paid by the processor; that it is required by the Act to pay to the Collector of said District monthly the said processing tax with respect to all hogs slaughtered by it.

That during all of the times mentioned in the complaint plaintiff has been engaged in the business generally of slaughtering animals, including hogs, and selling the same for human consumption, and as a part of such business in preparing, manufacturing the meat and meat products therefrom; that said plaintiff is the owner of a large slaughtering house and packing house located in the city of Venon, Los Angeles county, California, equipped with costly machinery and appliances for the successful carrying on of its business; and that all of the said business is entirely carried on and the transportation and sale

of all said meat and meat products are transported and sold by it wholly within the boundaries of the said state of California, and it does not in anywise obstruct or interfere with interstate commerce.

Paragraph X. That since the 5th day of November, 1933, there has been levied and assessed on hogs processed by plaintiff said tax, and in addition to the illegal and unwarranted collection of said tax from said plaintiff, said plaintiff has been directly, oppressively and ruinously affected by such assessment and collection of the tax.

That during the year 1934 plaintiff suffered a loss in the operation of its pork department of about $6,208.00, taking into consideration the cost of materials and the fixed operating expenses; while for the first five months of the year 1935, said loss was the sum of $10,496.62 on a like basis; that such loss is directly due to the collection and levying of said processing tax.

That prior to the levy of said tax, plaintiff was able over a long period of years to operate its said pork business on a satisfactory basis, but since the advent and collection of said taxes, plaintiff has suffered large losses in its said pork packing business, and in fact during such time plaintiff could not have continued in such business, excepting that the departments of plaintiff's meat packing business other than the pork department have absorbed such loss to such extent that plaintiff has been enabled to continue to carry on its said pork packing business.

That there has been levied and paid by said plaintiff from November, 1933, to and including February, 1935, taxes in the total sum of $97,092.79; and that the tax levied against plaintiff in terms of percentage to the sales of pork made by plaintiff during said time was 22.78%

for the year 1934 and 17.85% for the first five months of 1935; and that said plaintiff cannot make such payments and continue to carry on its business.

That inasmuch as plaintiff cannot control the retail prices of pork and the retailers of such commodity have been unable to raise the retail price thereof to such level that plaintiff is enabled to pass the amount of such tax on to the consumer, said plaintiff is compelled to bear the loss of that portion of the tax not absorbed by the consumer, which is considerable, and such loss is irreparable to plaintiff, said plaintiff having no way to recover the same.

Paragraph XI. That for the months of March, April and May, 1935, there has been assessed against plaintiff the total sum of $19,335.41, and that this tax has not been paid for the reason so to do would create in said pork packing business a further and additional loss to the extent and amount of such tax; and that any attempt to collect such tax, or any part thereof, is illegal and beyond the power of the Collector of Internal Revenue so to do; that such assessment and collection of said taxes will continue in the future; and that such further taxes cannot and will not be paid by plaintiff for the foregoing reasons.

Paragraph XII. That the failure of plaintiff to pay said processing taxes when due will result in the imposition by the Collector of Internal Revenue of the penalties against plaintiff

(a) Interest at the rate of one per cent per month;

(b) Five per cent of the total amount of the tax on failure to pay within ten days after demand, and the tax

and this penalty bear interest thereafter at the rate of one per cent per month;

(c) After a second ten days notice if the tax, etc., be not so paid the Collector may distrain the plaintiff's slaughtering house and plant, together with its other property in order to realize the amount of its tax, etc.;

(d) Section 19, subsection (b) of the Act subjects plaintiff to a fine of $10,000.00 or imprisonment or both, with costs of prosecution, and in which event the tax is doubled.

That repeated levies upon the said property of plaintiff from month to month will cause plaintiff irreparable loss and damage in that such proceeding will impair the valuable good will of its business built up since its incorporation, and will seriously interfere with if not prevent the actual operation of its plant, and the sale of its products, and will result in a permanent injury to its business and good will in excess of $200,000.00, and if the Collector of Internal Revenue should from month to month sell such property under such distraint the whole thereof and the good will of the business will become wholly lost to plaintiff.

That unless defendants are enjoined and restrained by order of the Court, they will assess said taxes against plaintiff and impose said penalties upon it for the nonpayment of the tax, collect such tax now or hereafter due, whether by distraint, action in law or in equity, impose liens on plaintiff's property, sell said property in collection of the tax, and thereby wholly take from plaintiff its property and good will, and unless defendants are restrained and until hearing hereof temporarily enjoined, they will

proceed against plaintiff as above even though this Court shall have declared such tax to be illegal and thereby render valueless to plaintiff such declaratory judgment.

Paragraph XIII. That the said tax levied for the months of March, April and May, 1935, is invalid and void in that the rate of such tax has been fixed by the Secretary of Agriculture in complete disregard to the formula under the Act; that the rate of the assessment of said tax for those months was $2.25 per hundredweight live weight of hogs, and under the formula it should have been for March $1.14, and for April $1.36; and that the excess of pre-war parity over the actual current price was even less for the month of May, and that the tax for these months is greatly in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question, and that for that reason the tax levied for those months is arbitrary, capricious, oppressive and in disregard of the standards prescribed by the Act, and consequently these taxes are void and uncollectible.

Paragraph XIV. That the processing tax is unconstitutional for the following reasons:

(a) The scheme of local production-control set up by the Agricultural Adjustment Act is not within any of the powers conferred upon Congress by the Constitution of the United States; and if it is the exercise of any governmental power, it is of a power reserved to the states under the tenth amendment to said Constitution; that the declared policy of such Act is to limit production of farm products, to raise the price of such products, and to fix prices at an arbitrary level which will give the farmer the same purchasing power for his products or their fair exchange

value as they presumably had in the period 1909-1914; that the power thus to control production is nowhere expressly or impliedly granted to Congress by the Constitution; that the processing tax is not a revenue measure but an integral part of a scheme to accomplish an unconstitutional purpose; and that the tax goes into effect only when benefit or rental payments are found necessary by the Secretary of Agriculture, and automatically ceases when farm prices reach the level fixed by the Act.

(b) The processing tax (considered apart from the scheme for production control) is not within the power granted to Congress by article I, section 8, of the Constitution of the United States "to lay and collect taxes, duties, imposts and excises"; and is in violation of the fifth amendment to the Constitution in that it takes property without due process of law; that it is not a tax within the meaning of the Constitution; that it is merely an invalid means to accomplish an illegal end; that the proceeds of such tax are not levied for general revenue or for a public purpose, but on the contrary, the exaction is an arbitrary levy upon one class of citizens for the benefit of another class; that the rate of tax bears no reasonable relation to the property taxed, and is not based upon the amount of property involved or the amount of business done, but upon purely arbitrary and unrelated factors having to do only with the purchasing power of the proceeds derived from the sale of farm products; that these factors in turn are constantly variable, uncertain and impossible of exact determination; and the rate of tax is consequently indefinite and shifting; that the exaction is neither a tax on property nor a tax upon sales; and that

the rate is exorbitant, confiscatory and destructive of lawful business.

(c) Assuming the tax to be otherwise valid, the power granted by the Act to the Secretary of Agriculture to determine and levy the processing tax involves an invalid delegation by Congress of its power to tax; for the Secretary of Agriculture alone determines at his own discretion the particular commodity to be taxed, when the tax is to be levied, what the rate of the tax shall be, when the tax shall begin, and when the tax is to cease; and that this is in violation of article I, section 1 of the Constitution aforesaid, as well as article I, section 8, paragraph 18 thereof.

(d) And lastly, the Act is violative of the fifth amendment to said Constitution, in that said Act interferes with and attempts to regulate intrastate commerce and to control and regulate wholly domestic affairs of the states respectively.

Paragraph XV. That an actual controversy exists over said Agricultural Adjustment Act between the parties hereto and of what it consists.

That said tax represents a continuing drain on the assets of plaintiff which it cannot meet and stay in business; that although requested the Collector has refused extension of time for the payment of the tax; and that plaintiff has exhausted all effort of obtaining any consideration or relief from defendants, and they will proceed to collect the tax, will subject all of plaintiff's property to lien and distraint preventing the sale by plaintiff of any thereof, and will sell the property and destroy the business and good will of plaintiff; and that for these reasons it is necessary that the controversy be determined between the parties.

Paragraph XVI. That plaintiff is in need of immediate equitable relief; that it has no adequate remedy at law and will suffer immediate, permanent and irreparable injury and damage unless the relief prayed for is granted.

That the plaintiff has not the resources to pay the taxes each month and thereupon bring its action to recover each installment, even if such remedy is technically available to it; that not only would there be involved a multiplicity of suits, but the delay incident to the termination of such actions at law would prove an effective deterrent because of the financial impossibility of making such payments, as well as is there grave doubt that any judgment obtained in such suit would ever be paid to plaintiff.

Paragraph XVII. That even if plaintiff should be successful in obtaining a final judgment or judgments in its favor for the recovery of such refund of such taxes, such judgment would be wholly and effectually nullified by the Congress failing and refusing to make the necessary appropriations to pay the same.

There is then alleged the threat of Congress to preclude plaintiff from bringing any action under the amendments to the Act then before the House.

In Second Cause of Action therein:

The second cause of action being for injunctive relief only contains in effect the same allegations as contained in the first cause of action, with certain other allegations, among which are the following contained in paragraph

XIX of said second cause of action, showing the following additional grounds and reasons for the injunction, to-wit:

(a) That irreparable loss and damage will result to plaintiff;

(b) That plaintiff would necessarily be compelled to bring a multiplicity of suits for refund;

(c) That plaintiff has no remedy at law.

And the plaintiff therein offers to do all equity.

All followed by the prayer of the complaint for declaratory judgment, for temporary restraining order and preliminary injunction pending the determination of the suit.

IX.

That the said supplement to the bill of complaint, etc., attached hereto as an exhibit deals with those facts arising since the filing of the original bill of complaint herein, including the fact of the adoption of the amendments to the Act on August 24, 1935.

Since the supplement is concise petitioner suggests that nothing is to be gained by attempting to set out here generally the substance of the supplement, but that the supplement itself may be referred to for all of its contents.

X.

Your petitioner further represents that although in its petition to the District Court for Appeal from said order vacating injunction, said plaintiff prayed for the issuance by said Court of a supersedeas staying the dissolution of said premilinary injunction pending appeal and for the

restoration of such injunction during that period, the Honorable Judge of that Court in relation thereto made the following order:

> "In view of the recent action of said Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for the granting of injunctions pending appeal to such Circuit Court in other causes involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the preliminary injunction so dissolved by order of this Court be restored to full force and effect during the pendency of this appeal, should be sought by plaintiff by application to the United States Circuit Court of Appeals for the Ninth Circuit for injunction pending appeal, if the plaintiff desires so to do."

The plaintiff, believing that it is justly entitled to restoration of said preliminary injunction, vacated by the order from which the appeal herein is taken, and that pending this appeal a supersedeas should be issued by this Honorable Court in effect restoring the force of said preliminary injunction, here presents and urges the following grounds and reasons for the relief sought by this petition:

(a) That, even if the Agricultural Adjustment Act, as amended, affords plaintiff the remedy by action at law for recovering refunds of processing taxes paid by plaintiff, yet plaintiff would be forced into bringing a great number of such suits for refund of such taxes paid, for the reason such taxes are to be paid monthly, thus creating a cause of action in plaintiff's favor each month such tax is paid; and furthermore, for the reason that under the Act

the plaintiff is precluded from commencing its action for refund until after the expiration of one year from the time it has filed its claim for refund for such monthly tax paid with the Commissioner of Internal Revenue, and there is legal possibility, if not probability, that during at least the first year of plaintiff's operations under the Act, as amended, plaintiff will be compelled to pay at least twelve monthly payments of said illegal taxes without authority to seek, during that time, a refund of any of the said taxes paid during that time; thus casting upon plaintiff a financial burden greater than it is and will be able to bear.

(b) That if said plaintiff does not pay said illegal taxes and injunctive relief is not afforded herein, then under said Amended Agricultural Adjustment Act, and the Revenue laws of the United States, including the regulations promulgated by the Secretary of the Treasury, said Collector for the Sixth District of California, his deputies and agents, may and will monthly levy upon, distrain and seize and sell the slaughtering house, packing plant, stock on hand, merchandise and other property of plaintiff in collection of such taxes; and that every such distraint and seizure will result in a separate and different trespass against plaintiff's property, and will constitute various and different breaches of the peace; thus causing to exist in plaintiff's favor an action for damage for each trespass and or breach of the peace aforesaid, and thus engendering a multiplicity of suits.

(c) Under the provisions of the Act, the defendant Collector of Internal Revenue is empowered to file and cast liens upon the real property of plaintiff for unpaid taxes; and, unless restrained from so doing, he will file

and create liens monthly on said property for and up to the amount of the unpaid taxes payable by plaintiff.

(d) That subsection (d) (1) of section 21 of the Act as amended provides that no recovery shall be made or allowed of any amount of the tax paid unless, after a claim has been filed, it shall be established to the satisfaction of the Commissioner of Internal Revenue that the claimant has not directly or indirectly included such amount in the price of the article processed from the commodity with respect to which it was imposed, *or has not passed on any part of such amount to the vendee or to any other person in any manner.* This act being reasonably susceptible of the construction that if it should be determined that the plaintiff passed on any part of the tax to the consumer or to anyone it is wholly precluded from a recovery of the tax paid, or any portion thereof.

Consequently, injunctive relief should be given to plaintiff for the reasons, the Act in the above respects is so dubious, unfounded and uncertain, that until the constitutionality of the Act is finally determined it is unjust and inequitable to compel plaintiff to pay a tax which obviously is invalid, and when thereafter probably plaintiff is provided no remedy at law for its recovery.

(e) The Act provides for the exaction from the plaintiff of inequitable, unreasonable and extraordinary penalties, including enormous interest, a penalty equal to the amount of the tax unpaid, and for each wilfull refusal to pay said tax, the plaintiff is made subject to a fine of $10,000.00 for each violation in that respect, and its officers participating in such refusal are also subject to such fine and imprisonment, or both, for each violation; and besides which the property of plaintiff can be seized and

sold by the Collector for the tax, thus not only depriving plaintiff of its liberty, but irreparably destroying to it its property, business and good will.

(f) That plaintiff is given and has no plain, adequate and complete remedy at law for the recovery of any of such illegal processing taxes paid by it, for the reasons, among others, as follows:

The Act as amended in terms denies to plaintiff the right to obtain declaratory relief under the Declaratory Judgments Act heretofore enacted by the Congress of the United States and signed by the President.

The Act as amended by its terms provides that the plaintiff cannot bring or maintain any action for the purpose of recovering any of said illegal processing taxes paid by plaintiff, if any part of the tax has been deducted from the price paid by plaintiff for the hogs purchased or added to the price received by the plaintiff for the products processed from such hogs, even though the amount so deducted or passed on is but a small part of the total tax.

(g) That if plaintiff does not pay said taxes, or any portion thereof, when payable, doubtless the said Collector of Internal Revenue will distrain, seize and sell, from month to month, the property of plaintiff, consisting of a large amount, thus placing it beyond the power of plaintiff to recover the value of such property, and the value of its business and good will incidentally destroyed.

(h) There is no appropriation of funds by Congress now available, or now provided to be available in the future, sufficient in amount to permit the refund to the plaintiff, and other processors, of processing taxes in the

event such taxes should hereafter be paid and the Act as amended is declared invalid.

(i) Section 21 of the Act as amended purports to allow the recovery of processing taxes illegally collected upon compliance with certain conditions therein mentioned; but the meaning and interest of such conditions are so uncertain, vague and ambiguous and so impossible of proof and determination, that no plain, adequate and complete remedy is furnished.

Even if plaintiff should be permitted under said section 21 to maintain a claim for refund although it has passed on some portion, less than the whole, of said tax, plaintiff would be compelled to proceed under subsection (d) of that section, which provides in effect that plaintiff will be precluded from securing refunds of any taxes heretofore or hereafter paid by it, even though such taxes are unconstitutional or invalid, unless the plaintiff establishes that it has not passed on the tax to the purchaser of the various products into which the hogs have been processed. Since it is and will be impracticable and impossible to allocate the proportional part of said processing tax assessed on the live weight of hogs to the various products resulting from such processing thereof, and to follow through and to allocate back the sale price to each of such products; for the reasons, among others, the hogs purchased by plaintiff are acquired at different times and under varying conditions and fluctuating prices and when the hogs are from time to time processed many and various products result therefrom commanding various sale prices; these products from hogs so purchased at various times aforesaid are of necessity comingled and stored together until sale thereof, and when sales are made from time to time there may be

and are included in each sale a varying and miscellaneous number of products from hogs thus purchased at different times; there is no method known to earmark each product and the products being marketed at different times and at greatly varied prices, it is consequently factually impossible to determine the sale price of the products of any one dressed hog as a whole.

In further support of the statements above made, we refer to the allegations of the said supplemental bill of complaint attached hereto as an exhibit, especially to paragraph VII *et seq* thereof.

(j) The meaning, purport and intent of said conditions are so uncertain, vague and ambiguous as to be legally and factually impossible to determine what portion, if any, of said tax has been passed on.

XI.

Plaintiff further represents that between the time the order granting the preliminary injunction was made and the injunction issued, and the time when such injunction was ordered dissolved, there has been no change in the facts or circumstances requiring the dissolution of said preliminary injunction;—but on the contrary the said amendments to said Agricultural Adjustment Act adopted after the issuance of said injunction and the dissolution thereof, only adds to the factual reasons and the legal principles supporting the order authorizing the injunction and the findings of the Court in that behalf. Reference is hereby had and made to said amendments to said Act for all the provisions thereof.

XII.

That in the minute order of said District Court granting the preliminary injunction, and by the terms of the preliminary injunction itself, it was provided to the effect that, as a condition for the issuance of said preliminary injunction, plaintiff should furnish security to the deefndants by undertaking in the penal sum of $25,000.00, conditioned that plaintiff would pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court, in the event it is finally decided the restraining order was improperly issued or this action is dismissed, it being provided therein, however, that in lieu of such undertaking plaintiff was given the option of depositing such sum in lawful money with the clerk of the above entitled Court, subject to like conditions. Within a few days thereafter said plaintiff did deposit with the clerk of said District Court the said sum of $25,000.00 in lawful money of the United States, and this money was so deposited with the understanding and under the agreement that in no event should it be paid over to said Collector of Internal Revenue until it should be finally decided that such restraining order was improperly issued or plaintiff's action herein dismissed. Notwithstanding the foregoing, on the 12th day of September, 1935, Honorable Paul J. McCormick, judge of said District Court, before whom the petition for rehearing on the motion vacating the injunction was had, ordered from the bench, in effect, that the Court would grant a motion of the deefndants at any time after September 23, 1935, without notice ordering paid over to the defendant Collector all monies deposited with the clerk at the time of the granting of the preliminary injunction.

Plaintiff has been informed by counsel and believes and therefore represents that unless a restraining order is granted herein or other equitable relief given to said plaintiff that said money so deposited by it will be paid over to said defendant Collector in violation of the order of said District Court contained in said order granting said preliminary injunction and in the preliminary injunction itself, because of which said plaintiff will be irreparably injured in the premises.

XIII.

Plaintiff alleges that it is ready and willing to give and hereby tenders any bond or security that may be required by the order of this Court.

XIV.

Plaintiff further represents that since in the final disposition of the causes set forth in the bill of complaint it will be necessary to determine important questions on the issues arising therein and on which depend the right to the relief prayed for, and the preliminary injunction having been properly granted and issued in the first instance on findings of fact amply supporting the issuance thereof, and no fact or circumstance having been shown to have occurred subsequent thereto rendering its dissolution proper, the injunction should continue in force until the final decree herein.

XV.

Your petitioner further represents that the said Agricultural Adjustment Act as amended is unconstitutional and uninforcible for the reasons alleged and shown in its original bill of complaint and petition for declaratory

relief and injunction and in the supplement thereto, all of which are attached hereto as exhibits, and to which reference is hereby had and made for those particulars.

XVI.

Your petitioner further represents that the dissolution of said preliminary injunction will cause to said petitioner great and irreparable loss and damage as herein shown.

Wherefore, petitioner prays that a supersedeas herein be granted by this Honorable Court superseding the execution of the said order made by said District Court vacating said preliminary injunction; and that a temporary restraining order be granted herein against said defendant, Nat Rogan, individually and as Collector of said Sixth District of California, similar in terms and effect as the said preliminary injunction vacated, as aforesaid; and that petitioner may have all other and further proper and necessary relief in the premises.

Dated, September ...., 1935.

STANDARD PACKING COMPANY,

By .....

(Corporate Seal) *President.*

JOSEPH SMITH,

GEO. M. BRESLIN,

Attorneys for said Petitioner.

State of California, County of Los Angeles.—ss.

T. P. Breslin being first duly sworn according to law deposes and says: That he is the president of the Standard Packing Company, a corporation, the petitioner named in the foregoing Petition for Supersedeas and Temporary Injunction; that he has read said Petition and knows the contents thereof, and that the statements made therein are true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true; and that he is authorized to make and does make this verification for and on behalf of said corporation.

.....

Subscribed and sworn to before me this .... day of September, 1935.

.....

Notary Public in and for the County of Los Angeles, State of California.

[Exhibit A.]

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

STANDARD PACKING COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. COHEE, Individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, Defendants.	NO. Eq. 698-H IN EQUITY BILL OF COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION.

The plaintiff, Standard Packing Company, a corporation, brings its bill of complaint against the defendants, Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California; and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, and complains and represents:

I.

That plaintiff is a corporation incorporated, organized and existing under the laws of the State of California,

and was so incorporated on the 28th day of September, 1913; that it was incorporated for the purpose, among other things, of slaughtering hogs and of packing, curing and selling pork and all hog products; that such corporation is a citizen of the State of California, and has its principal office and place of business in the City of Vernon, County of Los Angeles, State of California, and in the said Sixth District of California.

II.

That said defendant, Nat Rogan, is the duly appointed, qualified and acting Collector of Internal Revenue of and for the said Sixth District of California; and that said Nat Rogan is a citizen of the United States and of the State of California, and resides in the City of Los Angeles, State of California, and in the Sixth Collection District.

That said defendant, E. M. Cohee, was for many months prior to the 1st day of July, 1935, the Acting Collector of Internal Revenue of and for the Sixth District of California, and as such was duly appointed and qualified to perform the duties of that office; that he is now the Chief Deputy Collector of Internal Revenue of said District; and that he resides in the City of Los Angeles, County of Los Angeles, State of California, and in the said Sixth Collection District, and is a citizen of the United States and of the said State of California; and that such deputy is frequently in charge of the matter of collecting said revenue in said District in the temporary absence of the Collector.

That it is the duty of said Nat Rogan, as said Collector for said District to collect or attempt to collect in such

District all internal revenue payable therein, including all taxes, fines and penalties assessed against this plaintiff under the Agricultural Adjustment Act, hereinafter referred to, upon the hogs processed by plaintiff as defined in such Act; and that it is the duty of said E. M. Cohee to make collection of such revenue in the absence of said Nat Rogan, said Collector.

III.

That the said Sixth District was heretofore by law established as a subdivision of the United States for the purpose of the convenient collecting of taxes provided by the Internal Revenue law of such United States, and comprises and embraces the whole of that part of California lying south of a line constituting the north boundary lines of San Luis Obispo, Kern and San Bernardino Counties in said State of California.

IV.

That the matter in controversy exceeds in value the sum of $3,000.00, exclusive of interest and costs, and such matter and the controversy in relation thereto exist and arise under the Constitution and laws of the United States, of America, the relevant portions of which are hereinafter set forth and referred to.

V.

That for nearly twenty-two years last past plaintiff has been continually and actively engaged in the purchase, slaughter and processing of hogs and the sale of pork and hog products to retailers; and in the course of its business has developed and maintained a substantial and valuable trade and good will; and that said plaintiff at none of the times herein mentioned was engaged, nor is it

now engaged, in interstate commerce in any degree in the operation of its said business, nor does the carrying on of its said business in anywise obstruct or interfere with interstate commerce; that at all of the times herein mentioned said plaintiff, in the carrying on of its said business, slaughtered and processed and now slaughters and processes hogs only in the State of California, to-wit, in the said City of Vernon, and during such times transported and sold, and now transports and sells, the resulting pork and other products only within the boundaries of the said State of California, and not elsewhere.

VI.

That on May 12, 1933, the President of the United States approved PL #10 of the 73rd Congress of the United States (HR3835), known as the Agricultural Adjustment Act, 48 U. S. Stat. at Large, Part I, pp. 31, et seq., which said Act was thereafter amended June 16, 1933; April 7, 1934; May 9, 1934; May 25, 1934; June 16, 1934; June 19, 1934; June 26, 1934; June 28, 1934; and March 18, 1935, the same being Title I, Chapter 26, Act of May 12, 1933, U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive; that copies of the relevant sections and portions thereof are set forth in "Exhibit A", hereto attached and hereby referred to, and by such reference made a part hereof; and that the said Agricultural Adjustment Act is hereinafter, for the sake of brevity, sometimes referred to as the Act.

That the Act provides for the assessment and collection of what is styled in the Act a "tax", prescribes a formula by which the Secretary of Agriculture, a member of the Cabinet of the President of the United States, is to determine the measure or amount of such tax, and to specify

and determine the circumstances under which the tax becomes payable; that under this Act taxes have been assessed against the plaintiff in ruinous amounts and large sums have been paid by plaintiff on account, all as hereinafter specified in exact detail; that plaintiff charges, as hereinafter more particularly averred, that the Secretary of Agriculture ever since the 1st day of January, 1935, has ignored the formula specified in the Act in assessing the tax, and since said last mentioned date has assessed said tax and threatens to continue so to do in total disregard of the fact that the statutory conditions precedent to such assessment have ceased to exist; that plaintiff further charges, on the grounds hereinafter set forth, that, even if assessed as prescribed by the Act, the so-called tax is wholly illegal and void because the assessment thereof and the tax itself are in violation of the Constitution of the United States; and that plaintiff, being threatened with ruinous penalties for non-payment of said tax heretofore assessed under the Act against it and remaining unpaid, and being threatened with proceedings for the collection of said tax and penalties in a manner and to the extent that will wholly destroy the said business and good will of plaintiff, as hereinafter more particularly shown, and being without any adequate remedy at law, seeks the equitable relief herein prayed for.

VII.

That the provisions of said Act are applicable to hogs and a variety of other commodities; but for the sake of simplicity the provisions of the Act and the Act itself are herein analyzed as if it applied to and included only hogs.

That the objective of the Congress, as declared in the Act, is the restoration of a pre-war standard of value of

hogs in terms of power to purchase such articles as farmers buy; that this objective is sought to be obtained by a plan and scheme so to control the production of hogs as to raise their market price to the level at which the producer thereof will receive enough purchase money to enable him to buy, at current prices, as many of the said articles which farmers buy as, in the pre-war period, he would have been able to obtain by the sale of the same number of hogs.

That the nature of the control contemplated by the Act is to reduce production of hogs by the farmer to a point at which scarcity will result in a rise in the market price thereof, or otherwise to withdraw from the market hogs already produced, to the extent necessary to prevent the price from going down; that, however, instead of a direct statutory prohibition upon production, the scheme of the Act is to pay to the producer sums of money ample to deter him from production, thus substituting a pecuniary inducement to curtail production more potent and effective than an easily evaded prohibition.

That in order to acquire and raise the money necessary and required to make the aforesaid control of production effective, the Act directs the said Secretary of Agriculture to assess and levy on those slaughtering and processing hogs, and the resulting funds are then to be paid to the producers in the form of consideration or compensation for the theoretical losses sustained by the producer by and through the aforesaid resultant non-production.

That the statutory formula, contained in the Act, for determining the amount of the tax is that it is to be at such rate as equals the difference between the current average farm price for hogs and their fair exchange value

determined as above averred; and the Secretary of Agriculture is empowered to make the necessary findings of fact to effectuate the formula; that the tax is to be assessed against and collected from those processors, including the plaintiff, who buy hogs from the farmer and slaughter them for market; and that the slaughtering of the hog is defined by the act as "processing" and the tax is styled a "processing tax" but neither in fact nor in theory does the levy of the tax nor the determination of its amount bear any relation whatever to processing, but it appears to be so styled merely to identify who the citizens are who must pay the tax in order to raise the price to them of the hogs which the taxpayers buy.

That the scheme of the Act is not, however, confined to a reduction in the production of hogs; but the Act specifies a number of so-called basic agricultural commodities, all of which are subject to the same drastic regulations above described; that, in addition, the Secretary of Agriculture is given power to determine if the processing tax as levied upon the commodities specified in the Act and its amendments is causing or "will cause" a disadvantage to such commodities by reason of competition with any other commodities, or the products thereof; and if he finds such to be the case, he is empowered to proclaim such determination and a "compensatory tax" is thereafter to be levied upon such competing commodity or commodities, or the products thereof, at a rate to be determined and proclaimed by the Secretary of Agriculture; and that finally the Secretary is given power to license processors, associations of producers and others "to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing

commodity or product thereof"; that he may suspend or revoke any such license for violations of the terms or conditions; and any person engaged in such handling without a license as required by the Secretary is declared subject to a fine of not more than $1,000.00 for each day during which the violation continues.

That the dominant plan and scheme of the act as expressed therein is therefore to put in the hands of the Secretary of Agriculture effective and absolute control not only of the production of all agricultural commodities and the prices for which they are to be sold, but to give him equal control over the private business of all those who handle such commodities or their products, or any other products that may conceivably be deemed by him to be competitive.

And that according to its terms, the Act shall continue in its operation and in force and effect until such time as the President of the United States finds and proclaims that the National Economic Emergency, mentioned in the Act as the reason for the adoption thereof, has terminated and ended; that, however, such finding has not been made, and consequently said Act is yet effective and in force, and the said Collector of Internal Revenue for the Sixth Collection District is continuing and will in the future continue to collect, or attempt to collect said processing tax and otherwise execute the duties assigned to him under the Act, until and unless the Act is by decree of Court having jurisdiction thereof, adjudged to be unconstitutional and illegal, or until such Collector is enjoined by such Court from all such execution of the terms of said Act.

VIII.

That by virtue of the supposed authority conferred upon him by the Act, the Secretary of Agriculture determined and proclaimed a processing tax on hogs, to become effective as of November 5, 1933, at a rate of fifty cents per hundredweight, live weight; and that the said rate of tax was subsequently increased as follows, to-wit, in December, 1933, to $1.00 per hundredweight, live weight; in February 1934, to $1.50 per hundredweight, live weight; and in March, 1934, to $2.25 per hundredweight, live weight; and that such rate of said tax has ever since been and now is in effect.

IX.

That under the Act said processing taxes are assessed and collected on the first domestic processing of the commodities, including hogs, and are required to be paid by the processor; that, as hereinbefore shown, plaintiff has been at all of the times herein mentioned and now is a processor of hogs as defined by the Act, and is required by the Act to pay to the Collector of said District monthly the said processing tax so fixed, determined and proclaimed by said Secretary of Agriculture with respect to all hogs slaughtered by it.

That at and during all the times herein said plaintiff has been and now is engaged in the business generally of slaughtering animals, including said hogs, and selling the same for human consumption, and as a part of such business, in preparing and manufacturing the meat and meat products therefrom; that said plaintiff has

been at all said times and now is the owner of a large slaughtering house and packing house located in said City of Vernon, equipped with costly machinery and appliances for the successful carrying on and maintenance of said business, including the transportation and sale of said meat and meat products; but that all said business is entirely carried on, and the transportation and sale of all said meat and meat products are so transported and sold by it, only within the boundaries of the said State of California, and not in anywise in interstate commerce: nor does such business, transportation and sale in any degree obstruct or interfere with interstate commerce.

X.

That, therefore, such tax on the processing of hogs has been since the said 5th day of November, 1933, levied and assessed on all hogs processed by plaintiff during that time, and is now being so levied and assessed on all the hogs processed by plaintiff within the terms of the Act; that in addition to the illegal and unwarranted collection of said tax from plaintiff, said plaintiff has been and is continuing to be directly, oppressively and ruinously affected by such assessment and collection of such taxes.

That during the year 1934 plaintiff suffered a loss in the operation of its pork department of approximately $6,208.06, taking into consideration the cost of materials and the fixed operating expenses; while for the first five months of the year 1935 such loss was the sum of $10,-496.62, on a like basis, and that such loss occurring is

directly due to the levying and collection of said processing tax.

That prior to the levy of said tax, plaintiff was able, over a long course of years, to operate its said pork packing business on a satisfactory basis; that since the advent and collection of said tax from plaintiff, plaintiff has suffered, and will continue to suffer, so long as said Act is in force, large losses in its said pork packing business brought about directly by the collection of such tax, and, in fact, during such time plaintiff could not have continued and would not have continued in such business, excepting that the departments of plaintiff's meat packing business, other than the pork department, have succeeded in absorbing such loss to such extent that plaintiff has been enabled to carry on its meat packing business as an entirety, although such loss existed and was and is borne by plaintiff nevertheless.

That there has been levied and assessed against the plaintiff as a processor of hogs under the terms of the Act, commencing with all hogs processed on November 5, 1933, and thereafter, a processing tax, at the rate fixed by said Secretary of Agriculture, as aforesaid, on the live weight of all hogs processed by plaintiff from and after that date, and that plaintiff has paid on account of such tax to the Collector of Internal Revenue for said Sixth District the following sums of money for each of the following months since that time:

1933	
November	$ 2,008.87
December	4,992.20
1934	
January	5,653.35
February	6,546.74
March	6,317.14
April	6,672.16
May	6,111.60
June	8,322.21
July	7,489.64
August	5,751.07
September	5,716.57
October	6,612.98
November	6,177.28
December	6,345.45
1935	
January	6,112.46
February	6,263.07
Total	$97,092.79

And that for the months of March, April and May, 1935, there has been assessed against plaintiff a similar tax, as hereinafter shown, which yet remains unpaid.

That the said tax assessed against plaintiff, as aforesaid, in terms of percentage to the sales of pork made by plaintiff during said time was and is 22.78% for the year 1934, and 17.85% for the first five months of the year 1935; and the business of said plaintiff in its packing of pork cannot endure or make such payments

and continue to carry on such business, for the reason that the working capital allotted to such pork department of necessity will from time to time grow less and less and finally become entirely depleted.

That inasmuch as plaintiff cannot control the retail prices of pork, and the retailers of such commodity have been unable to raise the retail price thereof to such level that plaintiff is enabled to pass the amount of such tax on to the consumer, said plaintiff is compelled to bear the loss of that portion of the tax not absorbed by the consumer, which is considerable, and such loss is irreparable to said plaintiff, said plaintiff having no way to recover such loss.

XI.

That there has been assessed against plaintiff under said Act, as aforesaid, a processing tax in the following amounts, for the following months, the due date thereof being indicated, as follows:

1935	Amount of Tax	Due Date
March	$6,968.61	May 31, 1935
April	6,385.90	June 30, 1935
May	5,980.90	June 30, 1935

That said plaintiff has not paid the aforesaid taxes assessed for the months of March, April and May, 1935, for the reason so to do will create in its said pork packing business a further and additional loss to the extent and amount of such taxes, and furthermore, such plaintiff has been informed and believes, and therefore avers, that the assessment of such taxes is unconstitutional and void, and that any attempt to collect the same, or any

part thereof, is illegal and beyond the power of the Collector of Internal Revenue so to do.

Plaintiff further avers that so long as said Act is enforced, there will be levied and assessed against plaintiff processing taxes, in character and monthly average amount approximating the foregoing itemization of taxes, provided plaintiff continues during that time to slaughter hogs in like average volume as in the past, and that such future taxes cannot and will not be paid by plaintiff for the foregoing reasons.

XII.

That the failure of the plaintiff to pay said processing taxes, as and when due, will result in the imposition by the said Collector of Internal Revenue of the following penalties against plaintiff and the following losses to it:

(a) A penalty of interest at the rate of one per cent per month from the due date of each monthly installment of said tax;

(b) A penalty of five per cent of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the said Collector; said penalties being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent per month;

(c) After a second ten days' notice the Collector is authorized, under the provisions of the applicable law, if the tax, penalties and interest are not paid, to distrain the plaintiff's slaughtering house and plant, its manufactured products and merchandise on hand, cash on hand, bank accounts and all of its other property for the purpose of realizing the amount of the tax, penalty and interest;

(d) In adidtion thereto Section 19, subsection (b) of the Act provides: "That all provisions of law, including penalties, applicable with respect to the taxes imposed by Section 600 of the Revenue Act of 1926 and the provisions of Section 626 of the Revenue Act of 1932, shall insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title. * * *"

That under the provisions of this subsection (b), any person who willfully fails to pay said tax is subject to a fine of $10,000.00 or imprisonment, or both, with costs of prosecution, and is also liable to a penalty equal to the amount of tax not collected or paid.

That the plaintiff owns not only the slaughtering house and packing plant, together with the machinery and equipment hereinbefore described of great value, but manufactured products and merchandise on hand of a large value, and bank accounts and cash on hand; that repeated levies upon and distraint of this property from month to month will cause plaintiff irreparable loss and damage in that such levies and distraints will impair the valuable good will of its business built up since its incorporation, as aforesaid, and will seriously interfere with, if not prevent the actual operation of its plant and the sale of its products, and will result in a permanent injury to its business and good will in excess of $200,000.00; and if the said Collector of Internal Revenue should from month to month sell and dispose of such property under such distraint, the whole of said property and the good will of said business will become wholly lost to said plaintiff to its further irreparable damage in the premises.

That unless said defendants are enjoined and restrained by order of this Court from so doing, said defendants will assess processing taxes against plaintiff; impose said penalties upon plaintiff for the non-payment of the tax; collect from plaintiff the processing taxes now due or hereafter to become due, whether by distraint, levy, action at law or in equity; impose or give notice of intention to impose a lien or liens upon the property of plaintiff; make distraint upon the property of plaintiff on account of said tax and sell such property in collection of such tax; and thereby wholly take from plaintiff its said property and good will of said business; and that unless defendants are so restrained, and until hearing hereof temporarily enjoined, they will nevertheless proceed against plaintiff as above even though this Court shall have declared such tax to be illegal and unenforcible, and thereby render valueless to plaintiff such declaratory judgment.

XIII.

Plaintiff is advised and believes, and therefore avers and represents, that the processing tax levied by the Secretary of Agriculture upon the processing of hogs for the month of March, April and May, 1935, is invalid and void in that the rate of such tax has been fixed by the Secretary of Agriculture in complete disregard of the formula prescribed by the Agricultural Adjustment Act itself for the establishment of such rate; and plaintiff further avers that the Act provides, in Section 9 thereof, that the tax is to be at such rate as equals the difference between the current average farm price for the commodity taxed and the fair exchange value of that commodity; and that, as hereinbefore averred, the rate of tax was as of March, 1934, fixed by the Secretary of

Agriculture at $2.25 per hundredweight, live weight, of hogs, and such rate has been in effect continuously to the present date and is the rate upon which the tax for the months in question was assessed against plaintiff.

Plaintiff is informed and believes, and therefore avers, that for the first four months of the year 1935 the average current farm price of hogs, the fair exchange value therefor, and the resulting difference in dollars and cents between such figures, as calculated and determined by the Department of Agriculture, were as follows:

	Fair exchaige value of pre-war parity farm price for hogs	Actual farm price for hogs	Excess of pre-war parity over actual
1935			
January	9.10 per cwt.	6.87 per cwt.	2.23 per cwt.
February	9.17 " "	7.10 " "	2.07 " "
March	9.24 " "	8.10 " "	1.14 " "
April	9.24 " "	7.88 " "	1.36 " "

That by reason of the current average farm price for the month of May, 1935, the excess of pre-war parity over the actual current price was even less than for the month of April; that the rate of such tax for the months in question is consequently substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question; and that for this reason the levy of the tax at the rate of $2.25 for the said months in question is arbitrary, capricious, oppressive and in disregard of the standards prescribed by the said Act of Congress, even though such Act be assumed to be valid; and that such tax so assessed against plaintiff for said months is void and uncollectible by reason of the failure to observe such standards, is in

excess of the authority conferred upon the Secretary of Agriculture, and is entirely unjustified even by the plan and scheme outlined by the Act.

XIV.

Plaintiff further represents that the said processing tax on hogs is unconstitutional, illegal and void for the following reasons:

(a) The scheme of local production-control set up by the Agricultural Adjustment Act is not within any of the powers conferred upon Congress by the Constitution of the United States; and if it is the exercise of any governmental power, it is of a power reserved to the states under the Tenth Amendment to said Constitution; that the declared policy of such Act is to limit production of farm products, to raise the price of such products, and to fix prices at an arbitrary level which will give the farmer the same purchasing power for his products or their fair exchange value as they presumably had in the period 1909-1914; that the power thus to control production is nowhere expressly or impliedly granted to Congress by the Constitution; that the processing tax is not a revenue measure but an integral part of a scheme to accomplish an unconstitutional purpose; and that the tax goes into effect only when benefit or rental payments are found necessary by the Secretary of Agriculture, and automatically ceases when farm prices reach the level fixed by the Act.

(b) The processing tax (considered apart from the scheme for production control) is not within the power granted to Congress by Article I, Section 8, of the Constitution of the United States "to lay and collect taxes, duties, imposts and excises"; and is in violation of the Fifth Amendment to the Constitution in that it takes prop-

erty without due process of law; that it is not a tax within the meaning of the Constitution; that it is merely an invalid means to accomplish an illegal end; that the proceeds of such tax are not levied for general revenue or for a public purpose, but on the contrary, the exaction is an arbitrary levy upon one class of citizens for the benefit of another class; that the rate of tax bears no reasonable relation to the property taxed, and is not based upon the amount of property involved or the amount of business done, but upon purely arbitrary and unrelated factors having to do only with the purchasing power of the proceeds derived from the sale of farm products; that these factors in turn are constantly variable, uncertain and impossible of exact determination; and the rate of tax is consequently indefinite and shifting; that the exaction is neither a tax on property nor a tax upon sales; and that the rate is exorbitant, confiscatory and destructive of lawful business.

(c) Assuming the tax to be otherwise valid, the power granted by the Act to the Secretary of Agriculture to determine and levy the processing tax involves an invalid delegation by Congress of its power to tax; for the Secretary of Agriculture alone determines at his own discretion the particular commodity to be taxed, when the tax is to be levied, what the rate of the tax shall be, when the tax shall begin, and when the tax is to cease; and that this is in violation of Article I, Section 1 of the Constitution aforesaid, as well as Article I, Section 8, paragraph 18 thereof.

(d) And lastly, the Act is violative of the Fifth Amendment to said Constitution, in that said Act interferes with and attempts to regulate intrastate commerce and to control and regulate wholly domestic affairs of the states respectively.

XV.

Plaintiff further shows and represents that an actual and immediate controversy exists between said plaintiff and defendants, in that said plaintiff has heretofore maintained and now maintains, and has so notified and advised the Collector of Internal Revenue of said Sixth District, that the said Act was unconstitutional, void and uninforcible for the reasons hereinbefore assigned for such unconstitutionality thereof, and has refused to pay the tax now due and payable by this plaintiff, as aforesaid, for that reason, as well as for the reason of its inability so to pay; whereas, on the other hand said Collector of Internal Revenue of said District has at all times maintained and now maintains, and has so stated to said plaintiff, that said Act is constitutional and enforcible, and that he intends to and will proceed to assess the tax provided by said Act on the hogs processed by this plaintiff, as aforesaid, and to collect such tax so levied under the terms and authority of said Act.

That said tax represents a continuing drain on the assets of plaintiff, which it cannot meet and still remain in business; that plaintiff has made request to said Collector of said District for an extension of time for the payment of the said tax assessed against said plaintiff for the hogs processed by it during the month of March, 1935, as aforesaid, but that defendants have recently notified said plaintiff that such request is denied, and that, therefore, further time cannot be obtained by said plaintiff for the payment of said March tax; that plaintiff has even offered to make an attempt to furnish the Collector of Internal Revenue for such District with a bond in an amount sufficient to cover the taxes, interest and penalties so due and

owing under the terms of said Act by said plaintiff, as aforesaid, but said Collector has refused to accept a bond even if plaintiff could have furnished such bond; and that, therefore, plaintiff has exhausted all efforts of obtaining any consideration or relief from said defendants, and they will proceed to collect said taxes under the terms of said Act and in the manner hereinbefore detailed; and that in aid thereof, said defendants will subject all of the property of said plaintiff to lien and distraint, and such lien and such distraint will prevent the sale or disposition of any of plaintiff's assets, and will completely and permanently destroy the business and good will of the plaintiff.

And that for these reasons it is meet, equitable and necessary that the aforesaid controversy should be determined between said parties.

XVI.

That plaintiff is in need of immediate equitable relief; that it has no adequate remedy at law and will suffer immediate, permanent and irreparable injury and damage unless the relief prayed for in this bill is promptly granted.

That the rate of said processing tax is so high that plaintiff is suffering an intolerable loss each month and will continue to do so as long as said Act is in effect; that said plaintiff cannot continue to pay the tax assessed against it and remain in the pork packing business, for the reason that the constant loss suffered in and by such business on account of the assessment and payment of said tax will greatly and finally exhaust and wholly deplete the asets and working capital of plaintiff used in such pork packing business.

That plaintiff has not the resources to pay the taxes each month and thereupon bring its action to recover each installment, even if such a remedy is technically available to it; that not only would there be involved a multiplicity of suits, but the delay incident to the termination of such actions at law would prove an effective deterrent because of the financial impossibility of making such payments, as well as is there grave doubt that any judgment obtained in any such suit would ever be paid to plaintiff.

XVII.

That in addition thereto the remedy of a suit by plaintiff, as aforesaid, to recover any such processing tax after payment by it under such Act would not on the one hand be of any benefit or gain to it, and on the other hand such action, in any event, will not be open and available to it; that as to the first instance, plaintiff is advised and believes, and therefore represents, that even if it should be successful in obtaining a final judgment or judgments in plaintiff's favor for the recovery and refund of such taxes so paid by it, such judgment would be wholly and effectually nullified by the Congress and the United States Government failing and refusing to make the necessary appropriation from the money in the Treasury of the United States, or to make other arrangements, for the purpose of the payment of such judgments, whether one or more; and in the second instance, that on or about the 18th day of June, 1935, the House of Representatives of the Congress of the United States enacted certain amendments (H. R. 8492) to the said Agricultural Adjustment Act, wherein among other things, it is provided that no suit or proceeding shall be brought or maintained, nor shall any judgment or

decree be entered by, any Court for a recoupment or refund of any tax assessed, paid, collected or accrued under said Act prior to the date of the adoption of said amendments, except and unless a final judgment or decree therefor should be entered prior to the date of the adoption of such amendment, nor for any taxes asssessed and collected after such amendments should be adopted; that doubtless such amendments will be likewise passed by the Senate and immediately thereupon signed and approved by the President of the United States, after which said plaintiff: would be powerless under the wording of the amendments above referred to to commence or maintain an action at law for the refund or recovery of any of such processing tax now assessed against it under said Act and remaining unpaid; that plaintiff is and will be unable not only to pay said tax, but if such should be paid, it would be unable to prosecute any suit or suits at law to final judgment before said amendments to said Act becomes effective.

That the mere threat that such amendments will become law, and doubtless such amendments will be enacted and become law, makes the availability of a legal remedy so doubtful, uncertain and hazardous, as to require and to entitle plaintiff to the equitable relief herein prayed for; and that plaintiff is advised and believes, and therefore represents, that should the proposed amendments become law, plaintiff will technically be deprived of any remedy at law by the express terms of the amendments, and, therefore, would be unable to test the validity of the assessment and collection of the tax in any proceeding whatever, unless the relief prayed for in this bill be granted as aforesaid.

SECOND CAUSE OF ACTION

FOR ANOTHER, FURTHER AND SECOND CAUSE OF ACTION AGAINST SAID DEFENDANTS, BEING FOR INJUNCTIVE RELIEF ONLY, said plaintiff complains and represents as follows:

I.

That plaintiff is a corporation incorporated, organized and existing under the laws of the State of California, and was so incorporated on the 28th day of September, 1913; that it was incorporated for the purpose, among other things, of slaughtering hogs and of packing, curing and selling pork and all hog products; that such corporation is a citizen of the State of California, and has its principal office and place of business in the City of Vernon, County of Los Angeles, State of California, and in the said Sixth District of California.

II.

That said defendant, Nat Rogan, is the duly appointed, qualified and acting Collector of Internal Revenue of and for the said Sixth District of California; and that said Nat Rogan is a citizen of the United States and of the State of California, and resides in the City of Los Angeles, County of Los Angeles, State of California, and in the Sixth Collection District.

That said defendant, E. M. Cohee, was for many months prior to the 1st day of July, 1935, the Acting Collector of Internal Revenue of and for the Sixth District of California, and as such was duly appointed and qualified to perform the duties of that office; that he is now the Chief Deputy Collector of Internal Revenue of said District; and that he resides in the City of

Los Angeles, County of Los Angeles, State of California, and in the said Sixth Collection District, and is a citizen of the United States and of the said State of California; and that such deputy is frequently in charge of the matter of collecting said revenue in said District in the temporary absence of the Collector.

That it is the duty of said Nat Rogan, as said Collector for said District to collect or attempt to collect in such District all internal revenue assessed against this plaintiff under the Agricultural Adjustment Act, hereinafter referred to, upon the hogs processed by plaintiff as defined in such Act; and that it is the duty of said E. M. Cohee to make collection of such revenue in the absence of said Nat Rogan, said Collector.

III.

That the said Sixth District was heretofore by law established as a subdivision of the United States for the purpose of the convenient collecting of taxes provided by the Internal Revenue law of such United States, and comprises and embraces the whole of that part of California lying south of a line constituting the north boundary lines of San Luis Obispo, Kern and San Bernardino Counties in said State of California.

IV.

That the matter in controversy exceeds in value the sum of $3,000.00, exclusive of interest and costs, and such matter and the controversy in relation thereto exist and arise under the Constitution and laws of the United States of America, the relevant portions of which are hereinafter set forth and referred to.

V.

That for nearly twenty-two years last past plaintiff has been continually and actively engaged in the purchase, slaughter and processing of hogs and the sale of pork and hog products to retailers; and in the course of its business has developed and maintained a substantial and valuable trade and good will; and that said plaintiff at none of the times herein mentioned was engaged, nor is it now engaged, in interstate commerce in any degree in the operation of its said business, nor does the carrying on of its said business in anywise obstruct or interfere with interstate commerce; that at all of the times herein mentioned said plaintiff, in the carrying on of its said business, slaughtered and processed and now slaughters and processes hogs only in the State of California, to-wit, in the said City of Vernon, and during such times transported and sold, and now transports and sells, the resulting pork and other products only within the boundaries of the said State of California, and not elsewhere.

VI.

That on May 12, 1933, the President of the United States approved PL #10 of the 73rd Congress of the United States (HR3835), known as the Agricultural Adjustment Act, 48 U. S. Stat. at Large, Part I, pp. 31, et seq., which said Act was thereafter amended June 16, 1933; April 7, 1934; May 9, 1934; May 25, 1934; June 16, 1934; June 19, 1934; June 26, 1934; June 28, 1934; and March 18, 1935, the same being Title I, Chapter 26, Act of May 12, 1933, U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive; that copies of the relevant sections and portions thereof are set forth in "Exhibit A", hereto attached and hereby referred to,

and by such reference made a part hereof; and that the said Agricultural Adjustment Act is hereinafter, for the sake of brevity, sometimes referred to as the Act.

That the Act provides for the assessment and collection of what is styled in the Act a "tax", prescribes a formula by which the Secretary of Agriculture, a member of the Cabinet of the President of the United States, is to determine the measure or amount of such tax, and to specify and determine the circumstances under which the tax becomes payable; that under this Act taxes have been assessed against the plaintiff in ruinous amounts and large sums have been paid by plaintiff on account, all as hereinafter specified in exact detail; that plaintiff charges, as hereinafter more particularly averred, that the Secretary of Agriculture ever since the 1st day of January, 1935, has ignored the formula specified in the Act in assessing the tax, and since last mentioned date has assessed said tax and threatens to continue so to do in total disregard of the fact that the statutory conditions precedent to such assessment have ceased to exist; that plaintiff further charges, on the grounds hereinafter set forth, that, even if assessed as prescribed by the Act, the so-called tax is wholly illegal and void because the assessment thereof and the tax itself are in violation of the Constitution of the United States; and that plaintiff, being threatened with ruinous penalties for non-payment of said tax heretofore assessed under the Act against it and remaining unpaid, and being threatened with proceedings for the collection of said tax and penalties in a manner and to the extent that will wholly destroy the said business and good will of plaintiff, as hereinafter more particularly shown, and being without any adequate remedy at law, seeks the equitable relief herein prayed for.

VII.

That the provisions of said Act are applicable to hogs and a variety of other commodities; but for the sake of simplicity the provisions of the Act and the Act itself are herein analyzed as if it applied to and included only hogs.

That the objective of the Congress, as declared in the Act, is the restoration of a pre-war standard of value of hogs in terms of power to purchase such articles as farmers buy; that this objective is sought to be obtained by a plan and scheme so to control the production of hogs as to raise their market price to the level at which the producer thereof will receive enough purchase money to enable him to buy, at current prices, as many of the said articles which farmers buy as, in the pre-war period, they would have been able to obtain by the sale of the same number of hogs.

That the nature of the control contemplated by the Act is to reduce production of hogs by the farmer to a point at which scarcity will result in a rise in the market price thereof, or otherwise to withdraw from the market hogs already produced, to the extent necessary to prevent the price from going down; that, however, instead of a direct statutory prohibition upon production, the scheme of the Act is to pay to the producer sums of money ample to deter him from production, thus substituting a pecuniary inducement to curtail production more potent and effective than an easily evaded prohibition.

That in order to acquire and raise the money necessary and required to make the aforesaid control of production effective, the Act directs the said Secretary of Agriculture to assess and levy on those slaughtering and proc-

essing hogs, and the resulting funds are then to be paid to the producers in the form of consideration or compensation for the theoretical losses sustained by the producer by and through the aforesaid resultant non-production.

That the statutory formula, contained in the Act, for determining the amount of the tax is that it is to be at such rate as equals the difference between the current average farm price for hogs and their fair exchange value determined as above averred; and the Secretary of Agriculture is empowered to make the necessary findings of fact to effectuate the formula; that the tax is to be assessed against and collected from those processors, including the plaintiff, who buys hogs from the farmer and slaughters them for market; and that the slaughtering of the hog is defined by the act as "processing" and the tax is styled a "processing tax", but neither in fact nor in theory does the levy of the tax nor the determination of its amount bear any relation whatever to processing, but it appears to be so styled merely to identify who the citizens are who must pay the tax in order to raise the price to them of the hogs which the taxpayers buy.

That the scheme of the Act is not, however, confined to a reduction in the production of hogs; but the Act specifies a number of so-called basic agricultural commodities, all of which are subject to the same drastic regulations above described; that, in addition, the Secretary of Agriculture is given power to determine if the processing tax as levied upon the commodities specified in the Act and its amendments is causing or "will cause" a disadvantage to such commodities by reason of competition with any other commodities, or the products

thereof; and if he finds such to be the case, he is empowered to proclaim such determination and a "compensatory tax" is thereafter to be levied upon such competing commodity or commodities, or the products thereof, at a rate to be determined and proclaimed by the Secretary of Agriculture; and that finally the Secretary is given power to license processors, associations of producers and others "to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof"; that he may suspend or revoke any such license for violations of the terms or conditions; and any person engaged in such handling without a license as required by the Secretary is declared subject to a fine of not more than $1,000.00 for each day during which the violation continues.

That the dominant plan and scheme of the Act as expressed therein is therefore to put in the hands of the Secretary of Agriculture effective and absolute control not only of the production of all agricultural commodities and the prices for which they are to be sold, but to give him equal control over the private business of all those who handle such commodities or their products, or any other products that may conceivably be deemed by him to be competitive.

And that according to its terms, the Act shall continue in its operation and in force and effect until such time as the President of the United States finds and proclaims that the National Economic Emergency, mentioned in the Act as the reason for the adoption thereof, has terminated and ended; that, however, such findings has not been made, and consequently said Act is yet effective and in force, and the said Collector of Internal Revenue for the

Sixth Collection District is continuing and will in the future continue to collect, or attempt to collect said processing tax and otherwise execute the duties assigned to him under the act, until and unless the Act is by decree of Court having jurisdiction thereof, adjudged to be unconstitutional and illegal, or until such Collector is enjoined by such Court from all such execution of the terms of said Act.

VIII.

That by virtue of the supposed authority conferred upon him by the Act, the Secretary of Agriculture determined and proclaimed a processing tax on hogs, to become effective as of November 5, 1933, at a rate of fifty cents per hundred weight, live weight; and that the said rate of tax was subsequently increased as follows, to-wit, in December, 1933, to $1.00 per hundredweight, live weight, in February, 1934, to $1.50 per hundred weight, live weight; and in March, 1934, to $2.25 per hundredweight, live weight; and that such rate of said tax has ever since been and now is in effect.

IX.

That under the Act said processing taxes are assessed and collected on the first domestic processing of the commodities, including hogs, and are required to be paid by the processor; that, as hereinbefore shown, plaintiff has been at all of the times herein mentioned and now is a processor of hogs as defined by the Act, and is required by the Act to pay to the Collector of said District monthly the said processing tax so fixed, determined and proclaimed by said Secretary of Agriculture with respect to all hogs slaughtered by it.

That at and during all the times herein mentioned said plaintiff has been and now is engaged in the business generally of slaughtering animals, including said hogs, and selling the same for human consumption, and as a part of such business, in preparing and manufacturing the meat and meat products therefrom; that said plaintiff has been at all said times and now is the owner of a large slaughtering house and packing house located in said City of Vernon, equipped with costly machinery and appliances for the successful carrying on and maintenance of said business, including the transportation and sale of said meat and meat products; but that all said business is entirely carried on, and the transportation and sale of all said meat and meat products are so transported and sold by it, only within the boundaries of the said State of California, and not in anywise in interstate commerce; nor does such business, transportation and sale in any degree obstruct or interfere with interstate commerce.

X.

That, therefore, such tax on the processing of hogs has been since the said 5th day of November, 1933, levied and assessed on all hogs processed by plaintiff during that time, and is now being so levied and assessed on all the hogs processed by plaintiff within the terms of the Act; that in addition to the illegal and unwarranted collection of said tax from said plaintiff, said plaintiff has been and is continuing to be directly, oppressively and ruinously affected by such assessment and collection of such taxes.

That during the year 1934 plaintiff suffered a loss in the operation of its pork department of approximately $6,208.06, taking into consideration the cost of materials and the fixed operating expenses; while for the first

five months of the year 1935 such loss was the sum of $10,496.62, on a like basis, and that such loss occurring is directly due to the levying and collection of said processing tax.

That prior to the levy of said tax, plaintiff was able, over a long course of years, to operate its said pork packing business on a satisfactory basis; that since the advent and collection of said tax from plaintiff, plaintiff has suffered, and will continue to suffer, so long as said Act is in force, large losses in its said pork packing business brought about directly by the collection of such tax, and, in fact, during such time plaintiff could not have continued and would not have continued in such business, excepting that the departments of plaintiff's meat packing business, other than the pork department, have succeeded in absorbing such loss to such extent that plaintiff has been enabled to carry on its meat packing business as an entirety, although such loss existed and was and is borne by plaintiff nevertheless.

That there has been levied and assessed against the plaintiff as a processor of hogs under the terms of the Act, commencing with all hogs processed on November 5, 1933, and thereafter, a processing tax, at the rate fixed by said Secretary of Agriculture, as aforesaid, on the live weight of all hogs processed by plaintiff from and after that date, and that plaintiff has paid on account of such tax to the Collector of Internal Revenue for said Sixth District the following sums of money for each of the following months since that time:

1933	
November	$ 2,008.87
December	4,992.20
1934	
January	5,653.35
February	6,546.74
March	6,317.14
April	6,672.16
May	6,111.60
June	8,322.21
July	7,489.64
August	5,751.07
September	5,716.57
October	6,612.98
November	6,177.28
December	6,345.45
1935	
January	6,112.46
February	6,263.07
Total	$97,092.79

And that for the months of March, April and May, 1935, there has been assessed against plaintiff a similar tax, as hereinafter shown, which yet remains unpaid.

That the said tax assessed against plaintiff, as aforesaid, in terms of percentage to the sales of pork made by plaintiff during said time was and is 22.78% for the year 1934, and 17.85% for the first five months of the year 1935; and that the business of said plaintiff in its packing of pork cannot endure or make such payments and continue to carry on such business, for the reason that the working capital allotted to such pork department

of necessity will from time to time grow less and less and finally become entirely depleted.

That inasmuch as plaintiff cannot control the retail prices of pork, and the retailers of such commodity have been unable to raise the retail price thereof to such level that plaintiff is enabled to pass the amount of such tax on to the consumer, said plaintiff is compelled to bear the loss of that portion of the tax not absorbed by the consumer, which is considerable, and such loss is irreparable to said plaintiff, said plaintiff having no way to recover such loss.

XI.

That there has been assessed against plaintiff under said Act, as aforesaid, a processing tax in the following amounts, for the following months, the due date thereof being indicated as follows:

1935	Amount of Tax	Due Date
March	$6,968.61	May 31, 1935
April	6,385.90	June 30, 1935
May	5,980.90	June 30, 1935
Total	$19,335.41	

That said plaintiff has not paid the aforesaid taxes assessed for the months of March, April and May, 1935, for the reason so to do will create in its said pork packing business a further and additional loss to the extent and amount of such taxes, and furthermore, such plaintiff has been informed and believes, and therefore avers, that the assessment of such taxes is unconstitutional and void, and that any attempt to collect the same or any part thereof, is illegal and beyond the power of the Collector of Internal Revenue so to do.

Plaintiff further avers that so long as said Act is enforced, there will be levied and assessed against plaintiff processing taxes, in character and monthly average amount approximately the foregoing itemization of taxes, provided plaintiff continues during that time to slaughter hogs in like average volume as in the past, and that such future taxes cannot and will not be paid by plaintiff for the foregoing reasons.

XII.

That the failure of the plaintiff to pay said processing taxes, as and when due, will result in the imposition by the said Collector of Internal Revenue of the following penalties against plaintiff and the following losses to it:

(a) A penalty of interest at the rate of one per cent per month from the due date of each monthly installment of said tax;

(b) A penalty of five per cent of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the said Collector; said penalties being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent per month;

(c) After a second ten days' notice the Collector is authorized, under the provisions of the applicable law, if the tax, penalties and interest are not paid, to distrain the plaintiff's slaughter-house and plant, its manufactured products and merchandise on hand, cash on hand, bank accounts and all of its other property for the purpose of realizing the amount of the tax, penalty and interest;

(d) In addition thereto Section 19, subsection (b) of the Act provides: "That all provisions of law, including penalties, applicable with respect to the taxes imposed by

Section 600 of the Revenue Act of 1926 and the provisions of Section 626 of the Revenue Act of 1932, shall insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title. * * *"

That under the provisions of this subsection (b) any person who willfully fails to pay said tax is subject to a fine of $10,000.00 or imprisonment, or both, with costs of prosecution, and is also liable to a penalty equal to the amount of the tax not collected or paid.

That the plaintiff owns not only the slaughtering house and packing plant, together with the machinery and equipment hereinbefore described of great value, but manufactured products and merchandise on hand of a large value, and bank accounts and cash on hand; that repeated levies upon and distraint of this property from month to month will cause plaintiff irreparable loss and damage in that such levies and distraints will impair the valuable good will of its business built up since its incorporation, as aforesaid, and will seriously interfere with, if not prevent the actual operation of its plant and the sale of its products, and will result in a permanent injury to its business and good will in excess of $200,000.00; and if the said Collector of Internal Revenue should from month to month sell and dispose of such property under such distraint, the whole of said property and the good will of said business will become wholly lost to said plaintiff to its further irreparable damage in the premises.

XIII.

Plaintiff is advised and believes, and therefore avers and represents, that the processing tax levied by the Secretary of Agriculture upon the processing of hogs for the months of March, April and May, 1935, is invalid

and void in that the rate of such tax has been fixed by the Secretary of Agriculture in complete disregard of the formula prescribed by the Agricultural Adjustment Act itself for the establishment of such rate; and plaintiff further avers that the Act provides, in Section 9 thereof, that the tax is to be at such rate as equals the difference between the current average farm price for the commodity taxed and the fair exchange value of that commodity; and that, as hereinbefore averred, the rate of tax was as of March, 1934, fixed by the Secretary of Agriculture at $2.25 per hundredweight, live weight, of hogs, and such rate has been in effect continuously to the present date and is the rate upon which the tax for the months in question was assessed against plaintiff.

Plaintiff is informed and believes, and therefore avers, that for the first four months of the year 1935 the average current farm price of hogs, the fair exchange value therefor, and the resulting difference in dollars and cents between such figures, as calculated and determined by the Department of Agriculture, were as follows:

1935	Fair exchange value of pre-war parity farm price for hogs	Actual farm price for hogs	Excess of pre-war parity over actual
January	9.10 per cwt.	6.87 per cwt.	2.23 per cwt.
February	9.17 " "	7.10 " "	2.07 " "
March	9.24 " "	8.10 " "	1.14 " "
April	9.24 " "	7.88 " "	1.36 " "

That by reason of the current average farm price for the month of May, 1935, the excess of pre-war parity over the actual current price was even less than for the month of April; that the rate of such tax for the months

in question is consequently substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question; and that for this reason the levy of the tax at the rate of $2.25 for the said months in question is arbitrary, capricious, oppressive and in disregard of the standards prescribed by the said Act of Congress, even though such Act be assumed to be valid; and that such tax so assessed against plaintiff for said months is void and uncollectible by reason of the failure to observe such standards, is in excess of the authority conferred upon the Secretary of Agriculture, and is entirely unjustified even by the plan and scheme outlined by the Act.

XIV.

Plaintiff further represents that the said processing tax on hogs is unconstitutional, illegal and void for the following reasons:

(a) The scheme of local production-control set up by the Agricultural Adjustment Act is not within any of the powers conferred upon Congress by the Constitution of the United States; and if it is the exercise of any governmental power, it is of a power reserved to the states under the Tenth Amendment to said Constitution; that the declared policy of such Act is to limit production of farm products, to raise the price of such products, and to fix prices at an arbitrary level which will give the farmer the same purchasing power for his products or their fair exchange value as they presumably had in the period 1909-1914; that the power thus to control production is nowhere expressly or impliedly granted to Congress by the Constitution; that the processing tax is not a revenue measure but an integral part of a scheme to accomplish an unconstitutional purpose; and that the tax goes into

effect only when benefit or rental payments are found necessary by the Secretary of Agriculture, and automatically ceases when farm prices reach the level fixed by the Act.

(b) The processing tax (considered apart from the scheme for production control) is not within the power granted to Congress by Article I, Section 8, of the Constitution of the United States "to lay and collect taxes, duties, imposts and excises"; and is in violation of the Fifth Amendment to the Constitution in that it takes property without due process of law; that it is not a tax within the meaning of the Constitution; that it is merely an invalid means to accomplish an illegal end; that the proceeds of such tax are not levied for general revenue or for a public purpose, but on the contrary, the exaction is an arbitrary levy upon one class of citizens for the benefit of another class; that the rate of tax bears no reasonable relation to the property taxed, and is not based upon the amount of property involved or the amount of business done, but upon purely arbitrary and unrelated factors having to do only with the purchasing power of the proceeds derived from the sale of farm products; that these factors in turn are constantly variable, uncertain and impossible of exact determination; and the rate of tax is consequently indefinite and shifting; that the exaction is neither a tax on property nor a tax upon sales; and that the rate is exorbitant, confiscatory and destructive of lawful business.

(c) Assuming the tax to be otherwise valid, the power granted by the Act to the Secretary of Agriculture to determine and levy the processing tax involves an invalid delegation by Congress of its power to tax; for the Secretary of Agriculture alone determines at his own discretion

the particular commodity to be taxed, when the tax is to be levied, what the rate of the tax shall be, when the tax shall begin, and when the tax is to cease; and that this is in violation of Article I, Section 1 of the Constitution aforesaid, as well as Article I, Section 8, paragraph 18 thereof.

(d) And lastly, the Act is violative of the Fifth Amendment to said Constitution, in that said Act interferes with and attempts to regulate intrastate commerce and to control and regulate wholly domestic affairs of the states respectively.

XV.

That plaintiff is in need of immediate equitable relief; that it has no adequate remedy at law and will suffer immediate, permanent and irreparable injury and damage unless the relief prayed for in this bill is promptly granted.

That the rate of said processing tax is so high that plaintiff is suffering an intolerable loss each month and will continue to do so as long as said Act is in effect; that said plaintiff cannot continue to pay the tax assessed against it and remain in the pork packing business, for the reason that the constant loss suffered in said tax will greatly and finally exhaust and wholly deplete the assets and working capital of plaintiff used in such pork packing business.

That plaintiff has not the resources to pay the taxes each month and thereupon bring its action to recover each installment, even if such a remedy is technically available to it; that not only would there be involved a multiplicity of suits, but the delay incident to the terminaiton of such actions at law would prove an effective deterrent because of the financial impossibility of making such payments, as

well as is there grave doubt that any judgment obtained in any such suit would ever be paid to plaintiff.

XVI.

That in addition thereto the remedy of a suit by plaintiff, as aforesaid, to recover any such processing tax after payment by it under such Act would not on the one hand be of any benefit or gain to it, and on the other hand such action, in any event, will not be open and available to it; that as to the first instance, plaintiff is advised and believes, and therefore represents, that even if it should be successful in obtaining a final judgment or judgments in plaintiff's favor for the recovery and refund of such taxes so paid by it, such judgment would be wholly and effectually nullified by the Congress and the United States Government failing and refusing to make the necessary appropriation from the money in the Treasury of the United States, or to make other arrangements, for the purpose of the payment of such judgments, whether one or more; and in the second instance, that on or about the 18th day of June, 1935, the House of Representatives of the Congress of the United States enacted certain amendments (H. R. 8492) to the said Agricultural Adjustment Act, wherein among other things, it is provided that no suit or proceeding shall be brought or maintained, nor shall any judgment or decree be entered by, any Court for a recoupment or refund of any tax assessed, paid, collected or accrued under said Act prior to the date of the adoption of said amendments, except and unless a final judgment or decree therefor should be entered prior to the date of the adoption of such amendments, nor for any taxes assessed and collected after such amendments should be adopted; that doubtless such amendments will be likewise passed by the Senate and immediately thereupon signed and ap-

proved by the President of the United States, after which said plaintiff would be powerless under the wording of the amendments above referred to, to commence or maintain an action at law for the refund or recovery of any of such processing tax now assessed against it under said Act and remaining unpaid; that plaintiff is and will be unable not only to pay said tax, but if such should be paid, it would be unable to prosecute any suit or suits at law to final judgment before said amendments to said Act become effective.

That the mere threat that such amendments will become law, and doubtless such amendments will be enacted and become law, makes the availability of a legal remedy so doubtful, uncertain and hazardous, as to require and to entitle plaintiff to the equitable relief herein prayed for; and that plaintiff is advised and believes, and therefore represents, that should the proposed amendments become law, plaintiff will technically be deprived of any remedy at law by the express terms of the amendments, and, therefore, would be unable to test the validity of the assessment and collection of the tax in any proceeding whatever, unless the relief prayed for in this bill be granted, as aforesaid.

XVII.

That because of the fact said plaintiff has been advised and believes that said Agricultural Adjustment Act is unconstitutional, void and unenforcible, and that consequently the collection of a processing tax thereunder is unlawful and cannot be legally made and enforced, said plaintiff has concluded that such tax should not be paid further by it, and has refused to pay the said tax assessed, as aforesaid, for the said months of March, April and

May, 1935; as well as has plaintiff failed and refused to pay said tax, so remaining unpaid, for the additional reason it is unable to pay the same, and for the reason payment thereof by it, even if it could pay the same, would result in the utter ruin and consequent discontinuation of its pork packing business and the entire loss to plaintiff of the good will thereof.

That since said plaintiff has failed to pay the said tax assessed against it for the month of March, 1935, as aforesaid, said defendants have imposed a penalty of $348.43 against plaintiff and added same to said tax for that month, besides the interest provided by the Act to be charged upon non-payment of the tax; and will under the Act impose and add to the processing tax now unpaid, as well as to all future taxes assessed against plaintiff from month to month under the Act, additional penalties and interest.

That plaintiff has been informed and believes, and therefore avers, that under the terms of the Act said corporation, its officers and agents participating in such failure and refusal to pay said tax, are subject to arrest and to the fine and imprisonment provided in subsection (b) of Section 19 of the Act, for and on account of the refusal to pay said taxes assessed for the said months of March, April and May, 1935, or any part thereof, together with the penalties and interest thereon.

XVIII.

That said defendants threaten to do the following enumerated things and to take the following enumerated action and proceedings against plaintiff and its said property, and will do the things and take the action and proceedings, aforesaid, against plaintiff and its property,

with the following results, unless defendants are, and each of them is, by order of Court enjoined and restrained from doing such things and taking such action and proceedings against plaintiff and its said property, and threaten to and will do the said things and take such action and proceedings in the premises under the assumed power and authority given by the Act, and as directed thereby, to-wit:

Impose against plaintiff not only the penalties for the non-payment of the tax for the months of March, April and May, 1935, but the interest on the tax and on the penalties, as well.

Levy and assess further processing taxes on the hogs slaughtered or processed by plaintiff in the future, and impose like penalties and charge like interest thereon against plaintiff.

Create and cast a lien on plaintiff's said property and make distraint upon the same for and on account of and as security for the payment and collection of said tax, and do all this not only on account of the said tax now due and payable, but on account of taxes which might in the future be levied and assessed against said plaintiff for hogs processed by it hereafter.

Under such distraint, or otherwise, sell said property of plaintiff in order to realize and collect said tax, whether now assessed against plaintiff and remaining unpaid, or whether assessed against it in the future, such property, aforesaid, consisting of said slaughter house and packing plant, machinery and equipment contained therein or used in connection therewith, rolling stock, inventoried manufactured products, stock on hand, bills receivable, choses in action and money on hand and bank accounts, all

owned and possessed by plaintiff, at the present time, and having a reasonable market value of over $300,000.00.

And will otherwise demean themselves under the terms of said Act in relation to the processing tax assessed against plaintiff to the great and irreparable loss and damage of plaintiff.

XIX.

That the following are additional grounds and reasons why said defendants should be enjoined and restrained from doing the things and taking the action and proceedings, as aforesaid, against said plaintiff and its property, to-wit:

(a) That should said defendants create said lien upon said property, distrain and sell the same, as alleged, plaintiff will suffer irreparable loss and damage in that all of its said property, its business, including the pork packing business and the good will thereof, will be wholly swept away and lost to plaintiff; and thus destroy the aforesaid property and business of plaintiff and the good will thereof, all created and established by it over a period of nearly twenty-two years of ceaseless labor and efforts, without said plaintiff having any method or procedure under or by which it may have returned to it any of such property, good will and business, or any part thereof.

(b) That if said plaintiff should be relegated to its action or actions at law for the recovery and refund of any taxes paid in the future by plaintiff under the Act, assuming such action at law should be available to plaintiff, it would engender and result in a multiplicity of suits over and concerning the same subject matter between the same parties, in that since the tax becomes payable monthly the plaintiff would be compelled to commence and

maintain several actions in the premises for the recovery of the various installments of taxes paid; and that this proceeding would become and be most vexatious and exceedingly expensive to plaintiff.

(c) That said plaintiff has no remedy at law and is, therefore, compelled to bring its action in a Court of equity for the reasons alleged in paragraph XVI of this cause of action, the allegations of which paragraph are by reference hereby made a part of this subdivision (c).

XX.

Plaintiff further represents that heretofore it made request to said Collector of said District for an extension of time for the payment of said tax assessed against said plaintiff for the prcessing of hogs by it during the month of March, 1935, as aforesaid, but that defendants have recently notified said plaintiff that such request is denied, and that for that reason further time cannot be obtained by said plaintiff for the payment of said March tax; that said plaintiff even offered to make an attempt to furnish the Collector of Internal Revenue for such District with a bond in an amount sufficient to cover the said taxes for said three months, with the penalties and interest, but said Collector refused to accept the bond even if plaintiff could have furnished such bond; and that, therefore, plaintiff has exhausted all efforts of obtaining any consideration or relief from said defendants. Plaintiff offers to do all equity herein required of it by this Honorable Court.

WHEREFORE, plaintiff prays:

(a) That a writ of subpoena issue directed to said defendants requiring them to appear and answer this com-

plaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived.

(b) That it be determined and adjudged by this Court that an actual and immediate controversy exists between plaintiff on the one side and the defendants on the other concerning and in relation to the constitutionality and enforcibility of the said Agricultural Adjustment Act and the consequential right to assess and collect the processing tax on hogs thereunder.

(c) That it be determined, declared and adjudged by this Court that said Agricultural Adjustment Act is unconstitutional, illegal and void for the reasons averred and shown in this bill of complaint; and that the processing tax assessed on hogs under the terms of the Act is unconstitutional, void and uncollectible likewise for the reasons averred in said bill of complaint.

(d) That the Court declare and adjudge that the tax assessed upon the processing of hogs for the months of March, April and May, 1935, and for such subsequent taxable periods as may properly be the subject of consideration by this Court, is invalid and void, in that as in this bill alleged, the rate of said tax is substantially in excess of the difference between the average current farm price and the fair exchange value for hogs for the taxable period in question, and that said rate has been maintained at this figure in total disregard of the formula expressly prescribed by the said Act; and that the taxes for said months, as well as any subsequent taxes assessed under such rate, are arbitrary, capricious and oppressive, and in violation of the Fifth Amendment to the Constitution of the United States.

(e) That this Court adjudge and declare void any lien upon any property of the plaintiff that may now exist for

the amount of any processing tax allegedly due from plaintiff under said Act, or for any interest, penalty or additions to such tax, and together with any costs that may have accrued in relation to the same.

(f) That a temporary as well as preliminary injunction be issued and granted by said Court to said plaintiff against said defendants, after notice and hearing if required by said Court, enjoining the defendants, and each of them, and the deputies, officers, servants and/or agents of said defendants, and of each of them, until the final hearing of the causes of action in this bill contained, or until further order of this Court made herein, from imposing, levying and assessing against the plaintiff any processing tax under and pursuant to said Agricultural Adjustment Act; from collecting or attempting to collect in any manner or by any proceeding the said processing tax assessed against plaintiff under the Act for hogs processed by it during the said months of March, April and May, 1935, and yet remaining unpaid, as well as from collecting or attempting to collect in any manner or by any proceeding any taxes hereafter levied and assessed against plaintiff for hogs processed hereafter; from imposing or attempting to impose upon the plaintiff any interest or penalties on account of its failure to pay said processing tax, or any part thereof; from creating or filing a lien upon and from levying upon or distraining or selling the slaughtering house and packing plant, machinery and appliances therein contained or used in connection therewith, rolling stock, manufactured products on hand,

stock in trade, choses in action, money on hand and bank accounts, or other property of the plaintiff, on account of the non-payment of said processing tax now due and unpaid, or hereafter to become due and payable under the terms and provisions of said Act; and from hereafter enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said taxes; all from the date of the issuance of said temporary injunction until the final decree of this Court in this action; and that upon the final hearing of this action said temporary injunction be extended and made permanent against said defendants, and against each of them, and the deputies, officers, servants and/or agents of said defendants, and of each of them.

(g) And that plaintiff may have all other and further relief agreeable to equity and good conscience.

STANDARD PACKING COMPANY

By T. P. BRESLIN

(Corporate Seal) Its President

JOSEPH SMITH
GEO. M. BRESLIN
Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

T. P. BRESLIN being first duly sworn according to law deposes and says: That he is the president of the Standard Packing Company, a corporation, the plaintiff named in the foregoing bill of complaint and petition for declaratory judgment and injunction; that he has read said bill of complaint and petition and knows the contents thereof, and that the statements made therein are true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true; and that he is authorized to make and does make this verification for and on behalf of said corporation.

T. P. BRESLIN

Subscribed and sworn to before me this 1st day of July, 1935.

G. STUART SILLIMAN
Notary Public in and for the County
(Notarial Seal) of Los Angeles, State of California.

EXHIBIT "A"

(Pertinent sections of the Agricultural Adjustment Act)

The Policy of Congress:

"Sec. 2. It is hereby declared to be the policy of Congress

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the prewar period, August, 1909,—July, 1914. In the case of tobacco, the base period shall be the postwar period, August, 1919-July, 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage, which was returned to the farmer in the prewar period, August 1909-July, 1914."

Reduction Contracts, Benefit Payments, and Licenses:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments; and, in the case of sugar beets or sugar cane, in the event that it shall be established to the satisfaction of the Secretary of Agriculture that returns to growers or producers, under the contracts for the 1933-1934 crop of sugar beets or sugar cane, entered into by and between the processors and producers and/or growers thereof, were reduced by reason of the payment of the processing tax, and/or the corresponding floor-stocks tax, on sugar beets or sugar cane, in addition to the foregoing rental or benefit payments, to make such payments representing in whole or in part such tax, as the Secretary deems fair and reasonable, to producers who agree, or have agreed, to participate in the program for reduction in the acreage or reduction in the production for market, or both, of sugar beets or sugar cane. In the case of rice, the Secretary, in exercising the discretion conferred upon him by this section to provide for rental or benefit payments, is directed to provide in any agreement entered into by him with any rice producer pursuant to this section, upon such terms and conditions as the Secretary determines will best effectuate the declared policy of the Act, that the producer may pledge for

production credit in whole or in part his right to any rental or benefit payments under the terms of such agreement and that such producer may designate therein a payee to receive such rental or benefit payments. Under regulations of the Secretary or Agriculture requiring adequate facilities for the storage of any non-perishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest. (As amended by Sec. 14 of Public—No. 213—73rd Congress, approved May 9, 1934, and further amended by Sec. 7 of Public—No. 20—74th Congress, approved March 18, 1935.

(2) After due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: PROVIDED, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agree-

ment the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under Section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements. (As amended by Public—No. 142—73rd Congress, approved April 7, 1934.)

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000 for each day during which the violation continues.

(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this Title.

(5) No person engaged in the storage in a public warehouse of any basic agricultural commodity in the current of interstate or foreign commerce, shall deliver any such commodity upon which a warehouse receipt has been issued and is outstanding, without prior surrender and the provisions of this subsection shall, upon conviction, be punished by a fine of not more than $5,000, or by imprisonment for not more than 2 years, or both. The Secretary of Agriculture may revoke any license issued under subsection (3) of this section, if he finds, after due notice and opportunity for hearing, that the licensee has violated the provisions of this subsection."

Processing Taxes:

"Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that (1) in the case of sugar beets and sugarcane, the Secretary of Agriculture shall, on or before the thirtieth day after the adoption of this amendment, proclaim that rental or benefit payments with respect to said commodities are to be made, and the processing tax shall be in effect on and after the thirtieth day after the date of the adoption of this amendment, and (2) in the case of rice, the Secretary of Agriculture shall, before April 1, 1935, proclaim that rental or benefit payments are to be made with respect thereto, and the proces-

sing tax shall be in effect on and after April 1, 1935. In the case of sugar beets and sugarcane, the calendar year shall be considered to be the marketing year and for the year 1934, the marketing year shall begin January 1, 1934. In the case of rice, the period from August 1 to July 31, both inclusive, shall be considered to be the marketing year. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: PROVIDED, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that (1) if the Secretary has reason to

believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties, and if thereupon the Secretary finds that any such results will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity, and (2) for the period from April 1, 1935, to July 31, 1935, both inclusive, the processing tax with respect to rice shall be at the rate of 1 cent per pound of rough rice, subject, however, to any modification of such rate which may be made pursuant to any other provision of this title. In computing the current average farm price in the case of wheat, premiums paid producers for protein content shall not be taken into account. In the case of rice, the weight to which the rate of tax shall be applied shall be the weight of rough rice when delivered to the place of processing. In the case of sugar beets or sugarcane the rate of tax shall be applied to the direct-consumption sugar, resulting from the first domestic processing, translated into terms of pounds or raw value according to regulations to be issued by the secretary of Agriculture, and the rate of tax to be so applied shall be the higher of the two following quotients: The difference between the current average farm price and the fair ex-

change value (1) of a ton of sugar beets and (2) of a ton of sugarcane, divided in the case of each commodity by the average extraction therefrom of sugar in terms of pounds of raw value (which average extraction shall be determined from available statistics of the Department of Agriculture); except that such rate shall not exceed the amount of the reduction by the President on a pound of sugar raw value of the rate of duty in effect on January 1, 1934, under paragraph 501 of the Tariff Act of 1930, as adjusted to the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter 1.

(c) For the purpose of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Commodities:

"Sec. 11. As used in this title, the term "basic agricultural commodity" means wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, and any regional or market classification, type, or grade thereof; but the Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, marketing, and consumption are

such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof."

Appropriation:

"Sec. 12 (a) There is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agroculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy—and beef—cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy—and beef-cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000; PROVIDED, That not more than 60 per centum of such amount shall be used for either of such industries.

(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly

estimate from time to time the amounts, in addition to any money available under subsection (a) currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently became available under this subsection.

(c) The administrative expenses provided for under this section shall, include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title."

Tax on Competing Commodities:

"Sec. 15 (d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such com-

modities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary upon the basic agricultural commodity."

[Endorsed]: Filed Jul 2 ,1935. R. S. Zimmerman, Clerk; by Edmund L. Smith, Deputy Clerk.

[Exhibit B.]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE; AND TEMPORARY RESTRAINING ORDER.

To NAT ROGAN, both as an individual and as Collector of Internal Revenue for the Sixth District of California, and to his deputies, officers, servants and agents:

WHEREAS, in the above-named cause it has been made to appear by the verified bill of complaint and petition of plaintiff filed herein, that a restraining order preliminary to hearing upon application for a preliminary injunction is proper because of the allegations thereof of immediate and irreparable injury, loss and damage, and that prima facie the plaintiff is entitled to an order restraining temporarily the said defendant, Nat Rogan, individually and as Collector of Internal Revenue for said Sixth District of California, and his deputies, officers, servants and agents from doing the acts therein complained of and threatened to be committed.

NOW, THEREFORE, on motion of the plaintiff, by his attorneys, it is ordered that said Nat Rogan, both individually and as the Collector of Internal Revenue for the Sixth District of California, appear before the District Court of the United States, Southern District of California, Central Division, before Honorable H. A. Hollzer, Judge of said Court, at his Courtroom, in the Federal Building in Los Angeles, California, in said Dis-

trict, on the 12th day of July, 1935, at the hour of 10 o'clock A. M. of that day, then and there to show cause, if any there may be, why the preliminary injunction prayed for in said bill of complaint and petition and in

[Hollzer J.]

said motion requested should not issue.

And it appearing to the Court from the said bill of complaint and petition there is present danger that irreparable damage and injury will be caused plaintiff before notice can be served on defendant, said Nat Rogan, and a hearing had thereon, unless said Nat Rogan, individually and as said Collector, his deputies, officers, servants and agents, are restrained temporarily as herein set forth; for the reason as averred in the bill and petition certain taxes therein noted are due and payable and no further extensions for payment thereof can be obtained; that if said tax is not paid, and it cannot be paid and will not be paid for the reasons averred in the complaint, the said Collector of Internal Revenue threatens to and will in order to collect such tax distrain, levy upon and sell the property of plaintiff of a large value, thus irreparably destroying to plaintiff such property and the good will of its business described in the bill and petition; that plaintiff has no adequate and complete remedy at law for recovery as alleged in the bill and petition; that such injuries are irreparable to plaintiff because they cannot be compensated for in damages and may subject plaintiff to great penalties.

It is further ordered that said defendant, Nat Rogan, individually and as said Collector of Internal Revenue,

and all of his deputies, officers, servants and agents be and they are, and each of them is, restrained

(1) From assessing or attempting to assess against, or collecting or attempting to collect from plaintiff, under the Agricultural Adjustment Act, mentioned and described in plaintiff's bill of complaint and petition on file herein, the processing tax therein provided to be assessed against and collected from plaintiff on processing of hogs by it, whether such collecting or attempt to collect such tax by distraint, levy, sale and, or action at law or in equity;

(2) From collecting or attempting to collect said processing tax from said plaintiff in any other manner;

(3) From imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment of said processing tax;

(4) From enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said processing tax; and,

(5) From enforcing or attempting to enforce any of the provisions of said Act applicable to plaintiff in relation to said processing tax.

This temporary restraining order shall remain in force for ten days from the time of entry hereof, or until further order of the Court.

This temporary restraining order is granted without notice because such injuries are irreparable and liable to occur before a hearing upon notice can be had.

It is further ordered that copies of this order certified under the hand of the Clerk and the seal of this Court be served upon said defendant, Nat Rogan, both individually and as Collector of Internal Revenue for said Sixth District of California; and that such copies, together with said bill of complaint and petition be served upon said defendant both individually and as said Collector on or before the 3rd day of July, 1935; and a copy of said bill and petition on said defendant, E. M. Cohee, both individually and as said Deputy Collector, on or before such date.

This order signed and issued this 2nd day of July, 1935, at 9:40 o'clock A. M.

By the Court.

Hollzer
Judge.

[Endorsed]: Filed Jul 2 1935 R. S. Zimmerman, Clerk By F. Wayne Thomas, Deputy Clerk.

[Exhibit C.]

[Title of Court and Cause.]

PRELIMINARY INJUNCTION.

This cause came on regularly to be heard this 12th day of July, 1935, before Honorable Harry A. Hollzer, Judge of the above entitled Court, on the application of said plaintiff for a preliminary injunction upon plaintiff's verified complaint and petition for declaratory judgment, due notice of the hearing of which application was given to defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, and on the written motion of defendants to dismiss the bill of complaint and petition for declaratory judgment; and after hearing counsel for the respective parties, and the matters having been submitted to the Court for its consideration; and it appearing to the Court, and the Court finds that it is true, that certain processing taxes are due and payable from plaintiff under the terms of the Agricultural Adjustment Act, hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act; that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition for the reason that there is immediate danger that said defendant, Nat Rogan, either individually or as Collector of Internal Revenue, will proceed under said Act to collect from said plaintiff said taxes, and in so doing will distrain, levy upon and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing to plaintiff an irreparable loss of such property and the good will of plain-

tiff's business likewise mentioned in said bill of complaint and petition; and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy and adequate remedy at law in the premises; that if said restraining order is not so issued there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act; and that for all these reasons a preliminary restraining order should issue herein against defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, as prayed for in said bill of complaint and petition.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1st. That said defendant, Nat Rogan, both individually and as Collector of Internal Revenue for the Sixth District of California, his officers, agents, servants, employees and attorneys and those in active concert or participation with him, and who shall, by personal service or otherwise, have received actual notice hereof, shall be and they are and each of them is hereby enjoined and restrained from imposing, levying, assessing, demanding or collecting, or attempting to impose, levy, assess or collect, against or from said plaintiff, Standard Packing Company, a corporation, any processing taxes now due from and payable by plaintiff under and pursuant to the said Agricultural Adjustment Act adopted by the 73rd Congress of the United States, and being

"An Act to relieve the existing economic emergency by increasing agricultural purchasing power, to raise revenue

for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of Joint Stock Land Banks, and for other purposes,"

which Act was approved on May 12, 1933, and all Acts amendatory thereof; from imposing, levying, assessing, demanding or collecting, or attempting to impose, levy, assess or collect, against or from said plaintiff any taxes hereafter to become due from and payable by plaintiff and arising under the terms of said Act on hogs processed by it; from imposing or collecting or attempting to impose or collect upon or from said plaintiff any interest or penalties on account of plaintiff's failure to pay any of said processing taxes payable by plaintiff under the force of the Act, whether now due or hereafter to become due from plaintiff; from imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment by plaintiff of any of said processing taxes whether now due or hereafter to become due from plaintiff under the Act; from levying upon, distraining or selling plaintiff's slaughtering house, packing plant, the machinery and appliances therein contained and used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and money in bank, or any of such property, or any other property of plaintiff, on account or by reason of such non-payment of said or any of said processing taxes,

whether now due or hereafter to become due from and payable by said plaintiff under said Act; all from the date of the issuance of this preliminary injunction until the final decree of the Court in this case, or until further order of this Court;

2nd. This injunction is granted upon the condition that the plaintiff shall furnish security to the defendant, Nat Rogan, as Collector of Internal Revenue, as aforesaid, by undertaking with sufficient sureties to be approved by the Court in the penal sum of $25,000.00 conditioned that plaintiff will pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court in the event it is finally decided this restraining order was improperly issued or this action is dismissed; provided, that in lieu of such undertaking, plaintiff shall have and is hereby given the option of depositing the said sum of $25,000.00 in lawful money of the United States with the Clerk of the above entitled Court, subject to like conditions; and upon the further condition that said plaintiff shall continue to file with said Nat Rogan as said Collector of Internal Revenue monthly returns on all hogs processed by it, as required by said Act, such returns to be made on the forms provided therefor by the said Collector of Internal Revenue;

3rd. The Court, however, reserves the right to require additional security from plaintiff from time to time as may seem to the Court necessary to protect the defendant, Nat Rogan, as said Collector of Internal Revenue, or to modify this order in any part or particular, after notice to the parties hereto; and

4th. That the said motion of defendants to dismiss plaintiff's bill of complaint and petition for declaratory relief is denied; and defendants are allowed twenty days after notice hereof within which to answer said bill of complaint and petition for declaratory relief.

DATED at Los Angeles, California, this 31 day of July, 1935.

By the Court.

HOLLZER
Judge of said District Court.

Approved as to form:

CLYDE THOMAS,
Asst. U. S. Atty.

[Endorsed]: Filed Jul 31, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Exhibit D.]

[Title of Court and Cause.]

PETITION FOR APPEAL

To the HONORABLE PAUL J. McCORMICK, Judge of the District Court of the United States, Southern District of California, Central Division:

STANDARD PACKING COMPANY, a corporation, your petitioner, who is the plaintiff in the above entitled cause, considering itself aggrieved by the order of said Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in said cause, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and prays that this appeal may be allowed, and that pursuant thereto citation issue as provided by law, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, all to the end that the errors complained of may be corrected.

Petitioner tenders bond in such amount as this Honorable Court may require of it in order to perfect its appeal.

And desiring to supersede the execution of the said order or decree, petitioner tenders bond in such amount as the Court may require for such purpose; and prays that with the allowance of the appeal herein a supersedeas be

issued staying the dissolution of said preliminary injunction pending appeal, and restoring such injunction during the pendency of such appeal.

DATED, September 14th, 1935.

Joseph Smith and
George M. Breslin
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within this 14th day of Sept 1935 Clyde Thomas Asst U. S. Atty.

Filed Sept 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

MEMORANDUM OF CONCLUSIONS.

July 27, 1935.

By this suit plaintiff seeks both declaratory relief and also an injunction restraining the defendant Collector from enforcing collection of certain processing taxes levied pursuant to the provisions of the Agricultural Adjustment Act of May 12, 1933, and the regulations adopted thereunder. An order to show cause and temporary restraining order having been issued, the defendant collector has appeared and moved to dismiss the case. No issue has been raised as to any of the facts alleged in the verified complaint nor have any objections been interposed to the application for an injunction pendente lite, except such as are included in said motion to dismiss.

It appearing that there is grave doubt as to the constitutionality of the Act in question, particularly the provisions thereof applicable to the pending cause (See Schecter Poultry Corporation case decided by the Supreme Court May 27, 1935, also William Butler, et al, vs. United States, et al, decided by the United States Circuit Court of Appeals, First Circuit, July 13, 1935; Gold Medal Foods Inc. et al vs. Landry, etc, recently decided by the District Court in Minnesota); and

It appearing that there are unusual and exceptional conditions necessitating the issuance of an injunction, including the fact that the plaintiff will be driven to the

necessity of a multiplicity of suits if relegated to its remedy at law to protect its rights, (See Lee v. Bickell, 292 U. S. 415, 421).

This Court concludes that an injunction pendente lite should issue and that the motion to dismiss must be denied.

It further appearing that the facts alleged entitle plaintiff to declaratory relief (See Black v. Little, 8 Fed. Sup. 867 and cases therein cited),

The Court concludes that upon this additional ground the motion to dismiss must be denied.

[Exhibit E.]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

Now comes the plaintiff, STANDARD PACKING COMPANY, a corporation, and files the following assignment of errors upon which plaintiff will rely in the prosecution of the appeal from the order of the above entitled Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in the above entitled cause:

I.

The Court erred in granting defendants' motion to vacate said preliminary or temporary injunction.

II.

The Court erred in making its order vacating such preliminary or temporary injunction.

III.

The Court erred in holding that plaintiff's bill of complaint and petition for declaratory judgment and injunction did not state facts sufficient to justify injunctive relief to plaintiff.

IV.

The Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the case of Fisher Flouring Mills Company v. Collector, and cases consolidated therewith, de-

cided August 15, 1935, was binding upon the above entitled District Court and required the granting of the motion to vacate said preliminary injunction irrespective of the facts alleged in plaintiff's bill of complaint and petition for declaratory judgment and injunction, admitted by the defendants to be true, and which facts are wholly different and unlike the facts involved in the said Fisher Flouring Mills Company v. Collector and consolidated cases.

V.

The Court erred in holding that the said decision of the United States Circuit Court of Appeals for the Ninth Circuit required the granting of the motion to vacate the said preliminary injunction.

VI.

The Court erred in holding that the plaintiff was not entitled to any equitable or injunctive relief.

VII.

The Court erred in holding that plaintiff was not entitled to the preliminary injunction.

VIII.

The Court erred in holding that the plaintiff has a plain, speedy, adequate and complete remedy at law.

IX.

The Court erred in holding that the dissolution of the preliminary injunction heretofore granted by the Court will not result in a multiplicity of suits.

X.

The Court erred in holding that the dissolution of said preliminary injunction would not result in great and irreparable loss and damage to plaintiff.

XI.

The Court erred in holding that the dissolution of the preliminary injunction would not subject plaintiff and its officers and agents to heavy, extraordinary and inequitable penalties, both of a criminal and civil nature.

XII.

The Court erred in holding the Court was without jurisdiction to restrain or enjoin the collection of the processing taxes involved in this cause.

XIII.

The Court erred in holding that Section 3224 of the Revised Statutes of the United States prohibited the maintaining in any Court and particularly in the said District Court, of a suit for the purpose of restraining the assessment or collection of a Federal tax, and particularly said processing taxes assessed against plaintiff under the Agricultural Adjustment Act involved in this cause.

XIV.

The Court erred in holding that since the preliminary injunction was entered, the grounds alleged by plaintiff, and upon which such injunction was granted, were at the time of the dissolution of said injunction no longer in existence, because of the adoption by the Congress of H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other purposes, approved August 24, 1935".

XV.

The Court erred in holding that the preliminary injunction in this cause was granted on the basis that the bill amending said Act as originally passed by the House of Representatives denied the right to litigate the legality of processing taxes in actions at law.

XVI.

The Court erred in holding that the plaintiff was guilty of laches in bringing its action herein in that it paid the said processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of such tax.

XVII.

The Court erred in holding that the immediate stopping of the collection of said tax by said injunction would greatly embarrass the Government in its financial arrangements in reference thereto.

WHEREFORE, plaintiff prays that the said order vacating and dissolving said preliminary injunction be reversed and set aside, and that the said Circuit Court of Appeals for the Ninth Circuit render a proper order and decree in said cause; that such preliminary injunction be restored to its full force and effect as though the same had not been vacated; and that plaintiff may have such other and further relief as to the Court may seem just and proper in the premises.

DATED, September 14th, 1935.

JOSEPH SMITH and
GEORGE M. BRESLIN
Attorneys for said plaintiff and Appellant.

[Endorsed]: Received copy of the within this 14th day of Sept., 1935. Clyde Thomas, Attorney for Asst. U. S. Atty.

Filed Sept. 14, 1935. R. S. Zimmerman, clerk; by Edmund L. Smith, deputy clerk.

[Exhibit F.]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On motion of JOSEPH SMITH and GEORGE M. BRESLIN, attorneys for Standard Packing Company, a corporation, said plaintiff.

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of said District Court made and entered herein on the 30th day of August, 1935, vacating and dissolving the preliminary injunction theretofore issued by said Court on the 31st day of July, 1935, in said cause, be and the same is hereby allowed; and that a certified transcript of the record, proceedings and documents herein be transmitted to said Circuit Court of Appeals for the Ninth Circuit in the manner and as required by law and the rules of said Circuit Court of Appeals.

In view of the recent action of said Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for the granting of injunctions pending appeal to such Circuit Court in other causes involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the preliminary injunction so dissolved by order of this Court be restored to full force and effect during the pendency of this appeal, should be sought by

plaintiff by application to the United States Circuit Court of Appeals for the Ninth Circuit for injunction pending appeal, if the plaintiff desires so to do.

IT IS FURTHER ORDERED that the cost bond on appeal be fixed at the sum of $250.00.

DATED, September 14th, 1935.

Paul J. McCormick
Judge of said District Court.

[Endorsed]: Received copy of the within this 14 day of Sept., 1935. Clyde Thomas, Attorney for Asst. U. S. Atty.

Filed Sept. 14, 1935. R. S. Zimmerman, clerk; by Edmund L. Smith, deputy clerk.

[Exhibit G.]

[Title of Court and Cause.]

SUPPLEMENT TO BILL OF COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION.

Now comes STANDARD PACKING COMPANY, a corporation, the plaintiff in the above entitled action and, by leave of the above entitled Court first had, files this its Supplement to its Bill of Complaint and Petition for Declaratory Judgment and Injunction on file herein, and to each count or cause of action therein contained and alleged, and respectfully alleges and represents as follows:

I.

Since the commencement of said action, to-wit, on August 14, 1935, the House of Representatives passed a Bill (H. R. 8492) entitled "A Bill to amend the Agricultural Adjustment Act, and for other purposes." On August 15, 1935, the Senate passed the said Bill. On August 24, 1935, the President signed the said Bill. Under the provisions of said Amendatory legislation it is provided, among other things:

"(a) Section 12. Subsection (b) of the Agricultural Adjustment Act, as amended, is amended to read as follows:

***

Specific Tax Rates

(2) In the case of wheat, cotton, field corn, hogs, peanuts, tobacco, paper, and jute, and (except as provided in paragraph (8) of this subsection) in the case of sugarcane

and sugar beets, the tax on the first domestic processing of the commodity generally or for any particular use, or in the production of any designated product for any designated use, shall be levied, assessed, collected, and paid at the rate prescribed by the regulations of the Secretary of Agriculture in effect on the date of the adoption of this amendment, during the period from such date to December 31, 1937, both dates inclusive."

The purported rate of tax on the first domestic processing of hogs as prescribed by the regulations of the Secretary of Agriculture in effect on the date of the adoption of said amendment was $2.25 per hundredweight, live weight. By other provisions of said amendatory Act said tax rate may be increased or decreased according to methods therein provided, but no such change has been made to the date hereof.

"(b) Section 32. The Agricultural Adjustment Act as amended ,is amended by adding after Section 20, the following new section:

Sec. 21 (a). No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Delaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for

any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Apriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

* * * *

(d) (1) No recovery, recoupment, setoff, refund or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or

interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16 or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall

be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of Section 16, had the tax terminated by proclamation pursuant to the provisions of Section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law:

(1) No suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been

finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

* * * * *

(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

That pursuant to the provisions of said Agricultural Adjustment Act, and the proclamations and regulations issued by the Secretary of Agriculture, and regulations promulgated by the Secretary of the Treasury thereunder, the plaintiff, within the time provided by said Act and regulations, filed with said Nat Rogan, as said Collector of Internal Revenue returns for the respective months of June and July, both in 1935, showing the amount of processing tax claimed to be payable by plaintiff under the terms of said Agricultural Adjustment Act, with respect to the processing of hogs by it during the said months of June and July; that the said amounts so payable by plaintiff as disclosed in said returns, was for the said month of June, the sum of $1360.30; for the said month of July, the sum of $2251.26; that the payment of the said tax with respect to hogs processed during said month of June, 1935, became due on or before July 31, 1935, under the provisions of Articles 11 (b) and 26 (a) of Treasury Regulation 81, and the said tax for the said month of July became due on or before August 31, 1935, under said provisions of the said Regulation; that, while said plaintiff has not made its return to said Collector of the amount of hogs processed by it during the month of August, 1935, the amount of tax claimed to be payable by it under said Act on the amount of hogs processed by plaintiff during the said month of August is the sum of $2294.25, and that such last mentioned tax will become payable under said Act on or before September 30, 1935.

III.

That plaintiff has been advised by counsel and believes and therefore avers that the defendant Collector would have proceeded to collect from plaintiff, not only the processing taxes payable by plaintiff under the provisions of

said Agricultural Adjustment Act, and remaining unpaid, for the months of March, April and May, all in the year 1935, alleged in the original bill of complaint, etc., on file herein, but all other of such taxes thereafter due and payable by plaintiff under said Act, except for the issuance of the preliminary injunction heretofore issued herein, and that said defendant Collector will proceed to collect by summary process, including distraint, seizure and sale of the property of plaintiff, unless restrained from so doing.

IV.

That unless the plaintiff pays the said processing taxes, whether now existing and determined or hereafter to be determined under the provisions of said Agricultural Adjustment Act on hogs processed by it, or secures the equitable relief in said original bill of complaint, etc., and herein sought, it and its officers and agents participating in such failure or refusal of payment thereof will be subject to the great and unusual criminal penalties provided in Section 1114 (a) of the Revenue Act of 1926 (44. Stat. 116, U. S. C. Rule 26, Sec. 1265) and Section 19 (b) of the Agricultural Adjustment Act as amended, as well as will said plaintiff be subject to the great and extraordinary penalties provided by law.

V.

That plaintiff is advised by counsel, believes and therefore avers that the assessment and collection from the plaintiff of the said taxes, including those accrued before and after August 24, 1935, the date of the enactment of said amendatory Act, would be unconstitutional and illegal for the reason that the Agricultural Adjustment Act and the amendments thereto, under which said taxes respectively accrued and under which collection thereof is immi-

nent and will be attempted, violate the Constitution of the United States in the following, as well as in other particulars:

(a) The imposition of the tax of the character and for the purposes prescribed by said Agricultural Adjustment Act and the amendments thereto is not within the taxing power of Congress as defined by Article I, Section 8 of the Constitution;

(b) Said Act and the amendments thereto represent an attempt on the part of Congress to exercise powers which are reserved to the States respectively or the people by the Tenth Amendment to the Constitution;

(c) The imposition of processing taxes provided by said Act and the amendments thereto will deprive this plaintiff of its property without due process of law in violation of the Fifth Amendment to the Constitution;

(d) Said so-called taxes are not in fact or in law taxes but on the contrary are an attempted, illegal and unconstitutional exaction from plaintiff of its property without due process of law and in contravention of the aforesaid sections and amendments of the Constitution and each of them, for the benefit of a class and not to pay the debts or provide for the common defense or general welfare of the United States;

(e) The expressed purpose of the Agricultural Adjustment Act as it affects and appertains to this plaintiff is to regulate and control the production and processing of agricultural commodities, and particularly the raising and processing of hogs. Neither the raising nor the processing of hogs by the plaintiff constitutes directly or indirectly, or so affects, interstate commerce, as to vest in the Congress power to regulate such raising or pro-

cessing under the provisions of Article I, Section 8, Clause 3 of the Constitution;

(f) Said Act, as in effect prior to the 24th day of August, 1935, and as amended by the amendments approved by the President on said last mentioned date delegated and still does delegate to an administrative officer legislative powers conferred exclusively on Congress by Article I, Section 1, Article I, Section 7, and Article I, Section 8, Clause 18 of the Constitution. Section 21 (b) of the amendatory act approved August 24, 1935, which purports to legalize and ratify the so-called taxes determined, prescribed and proclaimed by the Secretary of Agriculture acting pursuant to the legislative powers thus delegated to him and to legalize and ratify the assessment, levy, collection and accrual of such taxes is invalid and ineffective;

(g) Said Act, as in effect prior to the said 24th day of August, 1935, and as amended by the amendments approved by the President on said last mentioned date, attempts to control and regulate business and commerce purely intrastate in contravention of Article I, Section 8, Clause 3 of the Constitution, as well as the Tenth Amendment thereto.

VI.

That Section 21 of the Agricultural Adjustment Act as amended purports to allow the recovery and refund of processing taxes illegally collected, upon compliance with certain conditions therein mentioned. The meaning, purport and intent of said conditions are so uncertain, vague and ambiguous as to be legally and factually impossible to determine, with the result that the remedies supposedly made available to the plaintiff by said section are not

plain, adequate or complete. By reason of the uncertainty, vagueness and ambiguity of the meaning, purport and intent of said conditions and restrictions upon the plaintiff's legal remedy the plaintiff is entitled to the equitable relief herein sought.

VII.

That the legal remedy which said Section 21 of the Agricultural Adjustment Act as amended purports to allow is neither plain, adequate nor complete for the following additional reasons:

(a) Under paragraph (d) of said Section 21, plaintiff will be precluded from securing refunds of any taxes heretofore or hereafter paid by it, even though such taxes are unconstitutional or invalid, unless the plaintiff establishes that it has not, either directly or indirectly, included the amount of such tax in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner. As a first domestic processor of a basic agricultural commodity (hogs), plaintiff is made liable in the first instance for the prescribed processing taxes and is required to pay said taxes out of its own funds. When paid by plaintiff, said taxes become part of the cost to it of the product which it ultimately sells to its customers. Said taxes, however, are imposed upon the first domestic processing of hogs, rather than upon the sale of the articles resulting from such processing. In the business of plaintiff, to-wit, the processing of hogs, the processing tax is levied upon the live weight of the hogs at the present rate of $2.25 per hundredweight. In such processing of hogs by plaintiff not more than

seventy-five per cent of said live hogs is usuable and sold by plaintiff in its said business, and such part of said hogs so usable and so sold in said business is divided into numerous and separate portions and products, including ham, sausage, bacon, lard, loin, hocks, feet, heads, shoulders, trimmings, casings, neck, tails and other portions; some of which said products are pickled and others smoked, and yet others of which go through sundry other processes, and some are sold as fresh meat. It would be and is virtually impossible to allocate the proportional part of said processing tax so levied on the live weight of the hog before processing to each of said portions and products thereof after processing; and further it is impossible to earmark and follow the different products of each hog after processing or to show or establish the cost of each of said various products therefrom or the sale price thereof for the reason that these various portions of many hogs so processed are, of necessity in said business, co-mingled and stored together until a sale of some portion of such co-mingled products is available and different products aforesaid are necessarily marketed at different times and at greatly varied prices, and because of which it is factually impossible to determine the sale price of the products of any one dressed hog as a whole.

Furthermore, plaintiff sells the products processed from hogs on the open market and in competition with other processors over the State of California, as well as other processors, who ship into and sell in said state like pork products. In the sale of such products plaintiff has not and does not add or include the processing tax as a separate item on its invoices. As a practical matter plaintiff would be precluded from doing so by its inability accurately to allocate any particular part of the tax to any

particular product or quantity thereof, and by the heavy penalties imposed by Section 20 of the Agricultural Adjustment Act, as amended, upon misstatements of the amount of tax allocated to any particular product.

Plaintiff avers, however, that it has been unable to pass all of said processing tax on to the ultimate consumer for the reasons alleged in its original bill of complaint, etc., and that the result of the operation and enforcement of said Agricultural Adjustment Act has been to cause and is causing plaintiff great inconvenience, embarrassment, loss and damage.

Due to economic and competitive conditions prevailing from time to time in the markets in which plaintiff buys hogs and sells the products therefrom, and to the perishable character of plaintiff's products, by reason of which it is upon occasions forced to make immediate and disadvantageous sales, it sometimes sells its said products at a loss and sometimes at a profit, and will necessarily continue to do so. Said Section 21(d) does not provide whether the price received by the plaintiff upon the sale of one of its products is to be allocated first to the full reimbursement of the processing tax payable by plaintiff, or first to the full reimbursement to plaintiff of its costs other than said taxes, or pro rata to all of plaintiff's costs. In the ordinary course of plaintiff's business it would be absolutely impossible to establish in the case of any particular portion or quantity of said products whether the tax with respect thereto was or was not passed on by plaintiff to its customers, and in particular it would be impossible to establish that any definite and ascertainable part of such tax was or was not so passed on. The assumption that a particular pork product, or any specified quantity thereof bears any

particular part of the tax is wholly arbitrary and is not susceptible of proof. Moreover, it cannot be ascertained with certainty, in respect of any particular sale of one of plaintiff's products, whether such sale resulted in a profit or a loss. Plaintiff's profit and loss experience can only be determined as the net result of its business over a substantial period of time. Thus the condition that plaintiff establish that no part of the amount of its tax has been passed on in any manner is one impossible of fulfillment with respect to any specific tax payment.

(b) In order to recover any processing taxes, if hereafter paid by it, plaintiff will be required to show under Section 21(d) of said Act as amended that the price paid by it for the hogs processed by plaintiff was not reduced by the amount of such processing tax. Plaintiff in the past has paid and for the future necessarily will pay for its purchases the competitive open market prices in effect at the time thereof. The market price of such commodity is, has been and will continue to be a fluctuating price depending upon market conditions in respect of supply, demand, costs of production, competition and other factors prevailing from time to time. The processing tax payable by plaintiff with respect to any hogs which it buys is only one of many factors affecting the market price of such commodity at any given time. The effect of such single processing tax factor upon the market price of hogs can at no time be isolated and determined. It is not possible for the plaintiff to show in respect of any purchase whether, or to what extent, the market price thereof was affected by said tax.

(c) The fact of such passing on of the said tax to the vendee or passing back of the said tax to the vendor

is not a fact that is merely difficult of ascertainment. It is a fact that it is impossible to determine, as herein alleged. Any attempt to define it is speculative and imaginary. By reason of the fact that plaintiff's right to receive a refund of taxes paid by it is limited by said requirement that it shall establish facts not susceptible of proof, said remedy is wholly illusory, unreasonable, fictitious and is not a plain, adequate and complete remedy at law, and is no remedy at all.

(d) Said Section 21(d) is susceptible of the construction that if any part of the processing tax has been deducted from the price paid by the plaintiff for its hogs or added to the price received by the plaintiff for its products processed from hogs, then the entire right to recover the tax is taken away, even if the amount so deducted from the price paid by the plaintiff for the hogs or so added to the price received by the plaintiff from its dressed products is but a small part of the total tax. So construed said section is arbitrary and unreasonable and in practical effect denies to the plaintiff all right to recover such portion of the processing tax, the burden of which was actually borne by it, all in violation of the said Fifth Amendment.

(e) The above conditions imposed upon the right of the plaintiff to recover taxes paid by it must, under said Section 21(d) be established to the satisfaction of the Commissioner of Internal Revenue, and apparently his determination regarding the existence of such conditions is not subject to judicial review. The transcript of the hearing before the Commissioner of Internal Revenue is the sole record of the case on appeal to the courts. The effect of said section is therefore to limit the function of the judicial review to the determination of whether there

was any evidence submitted to the Commissioner of Internal Revenue tending to support the findings of the Commissioner. Thus construed said Section 21(d) deprives the plaintiff of its property without due process of law in violation of the Fifth Amendment aforesaid.

VIII.

Under said Section 21(d) of said Agricultural Adjustment Act as amended, if the processing tax has been either passed on or passed back by the plaintiff, then the plaintiff cannot maintain any action to recover the tax, if it is ultimately determined to be invalid, either for its own account or for the account of the persons to whom the processing tax has been thus passed on or passed back by the plaintiff; nor can the persons to whom the processing tax has been thus passed on or passed back maintain such an action on their own account, but all right of action by anyone to recover the tax, if it has been passed on or passed back, has been wholly taken away by said amendments to said Agricultural Adjustment Act. Moreover, Section 21(a) of said Act and Section 405 of the Revenue Act of 1935 deprive the courts of power to render declaratory judgments with respect to such alleged taxes. By reason of the impossibilities of proof hereinabove referred to, the practical effect of said Acts will be to deny taxpayers all means of securing a judicial decision as to the constitutionality of the processing taxes, unless this court grants the relief herein sought.

IX.

Plaintiff's food products processed from hogs have been and are sold in close and active competition with foods not subject directly or indirectly to a processing

tax. The necessary result has been and is to greatly restrict, narrow and limit the market for plaintiff's products as compared with the available market if no processing tax had existed, and to alienate both past and prospective purchasers of plaintiff's products processed from hogs, and to greatly decrease and limit plaintiff's trade and profit possibilities, and the collection and enforcement of said unconstitutional and invalid tax is thus detrimental and prejudicial to plaintiff even though the tax or some portion thereof may be ultimately refunded.

X.

That if said plaintiff does not pay said illegal taxes, or any thereof, and injunctive relief be not afforded it herein, then under said Agricultural Adjustment Act and the Revenue laws of the United States, including the regulations promulgated by the Secretary of the Treasury, said Collector, his deputies and agents, may and will levy upon, distrain, seize and sell the plant, stock on hand, merchandise and other property of plaintiff in collection of such unpaid taxes; and every such distraint and seizure will result in a separate and different trespass against plaintiff's property, and will constitute various and different breaches of the peace; that plaintiff has been advised by its counsel and believes and therefore avers that said defendant Collector, his deputies and agents, so engaging in said various trespasses are and will be, and each of them is and will be, wholly unable to answer to plaintiff for the injury and damage thus occasioned plaintiff; and that by reason of such distraint, seizure and sale of plaintiff's property, its said property and the good will of its said business will be rendered of no value and render plaintiff unable to recover its aforesaid loss and damage, thus taking the property of

plaintiff without due process of law, and result in a multiplicity of suits, and deny to plaintiff a plain, speedy, adequate and complete remedy at law.

XI.

To require plaintiff to pay said invalid and unlawful processing tax without affording it an adequate remedy at law for the recovery thereof, and at the same time to forbid that any suit shall be maintained to enjoin the collection of such processing taxes will result in taking plaintiff's property for private use and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

XII.

Plaintiff has been advised by its counsel and verily believes and therefore avers that the said Agricultural Adjustment Act, as amended, violates the Constitution in the particulars hereinbefore set forth. It is challenging the constitutionality of said Act and the legality of the processing taxes imposed thereby in good faith. The imposition against plaintiff of the penalties provided by law for failure to pay said taxes, including the alleged interest of 1 per cent a month (Revenue Act of 1926, Sec. 626, 47 Stat. 69) during the pendency of this litigation, which is brought to test the constitutionality of said Act and the legality of the taxes imposed thereby, would deprive the plaintiff of its property without due process of law even if the plaintiff's claims in this action should ultimately be held to be unfounded.

XIII.

Plaintiff has no plain, adequate and complete remedy at law in the premises in that there is no appropriation of funds by Congress now available, or now provided to be available in the future, sufficient in amount to permit the refund to the plaintiff and other processors, of processing taxes in the event such taxes should hereafter be paid and said Agricultural Adjustment Act as amended is and shall be declared invalid. While said Act as amended purports to appropriate money for the purpose, among others, of making refunds of processing taxes paid, the amount of the appropriation available for that purpose is only that portion of the taxes collected under said Act which is not otherwise expended for rental and benefit payments, payments authorized to be made under section 8 of the Agricultural Adjustment Act as amended and administrative expenses.

XIV.

That the so-called remedy at law afforded plaintiff by the Act is dubious, unfounded and uncertain, and the uncertainty respecting the ability of plaintiff to satisfy its claim for refund if it attempts to pursue any remedy at law given it, entitles plaintiff to injunctive relief herein.

XV.

That said plaintiff has paid into court all processing taxes heretofore becoming due and payable by plaintiff under said Act, in conformity with the Court's order in that respect made herein, and if required by said Court will continue to pay into Court, and hereby offers to pay into said Court all other processing taxes payable by it at the time and as often as such taxes become due and payable by plaintiff; and that such taxes so paid into said

Court by plaintiff are to be paid to the Collector of said Sixth District of California if and when it is finally determined that the collection of said taxes from said plaintiff is not illegal and unconstitutional.

XVI.

That the purported taxes on account of hogs processed by plaintiff during the months subsequent to July and August, 1935, will fall due and become payable from time to time during the pendency of this action, and each and all of the allegations hereof with respect to the taxes payable by plaintiff on account of hogs heretofore processed by plaintiff are and will be equally applicable to the taxes payable by plaintiff on account of hogs heretofore processed by plaintiff; and unless plaintiff pays the said taxes for hogs processed in subsequent months monthly as they become due under the terms of said Agricultural Adjustment Act as amended, said defendant Collector will proceed to enforce collection of the same in the manner hereinbefore set forth and plaintiff will be subjected to the same consequences of failure to pay such taxes as are herein alleged and set forth with respect to the taxes on account of hogs heretofore processed by plaintiff, all of which will result in a multiplicity of civil actions and criminal prosecutions, to the great and irreparable injury of the plaintiff and to its business in the same manner and to the same extent set forth in said original bill of complaint, etc., and as hereinbefore set forth with respect to said taxes on account of hogs heretofore processed by plaintiff.

WHEREFORE, plaintiff prays:

First: That it may have all the relief prayed for in its original Bill of Complaint and Petition for Declaratory Judgment and Injunction on file herein;

Second: That a temporary restraining order may be issued against the defendant, Nat Rogan, and each of his officers, agents, attorneys and deputies, restraining them from collecting or attempting to collect said taxes from the plaintiff, whether now due and payable or hereafter to become due and payable under said Act and the amendments thereto, and whether by distraint, levy, posting of notices of liens, jeopardy assessment, or in any other manner, pending hearing on the prayer for a temporary injunction;

Third: That the defendant, Nat Rogan, and each of his officers, agents, attorneys and deputies, be enjoined temporarily until final hearing and permanently thereafter from collecting or attempting to collect in any manner from the plaintiff said taxes;

Fourth: That this Court declare said amendments to said Agricultural Adjustment Act and said Act as amended are unconstitutional and uninforcible, and that the said processing taxes are illegal and unconstitutional in the respects and for the reasons in said original bill of complaint, etc., and herein alleged and shown, and that the collection thereof from plaintiff would be violative of its constitutional rights;

Fifth: And for such other and further relief as to justice and equity may pertain, and for its costs.

JOSEPH SMITH and
GEORGE M. BRESLIN
Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

T. P. BRESLIN being first duly sworn according to law deposes and says: That he is the president of the Standard Packing Company, a corporation, the plaintiff named in the foregoing supplement to bill of complaint and petition for declaratory judgment and injunction; that he has read said supplement to bill of complaint and petition for declaratory judgment and injunction and knows the contents thereof, and that the statements made therein are true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true; and that he is authorized to make and does make this verification for and on behalf of said corporation.

T. P. BRESLIN

Subscribed and sworn to before me this 12th day of September, 1935.

(Notarial Seal) G. STUART SILLIMAN
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sept 12 1935 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.

No. 7981

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANDARD PACKING COMPANY, a corporation,

Appellant,

v.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,

Appellee.

Appeal from the District Court of the United States of America, in and for the Southern District of California, Central Division

BRIEF FOR THE APPELLEE

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SUBJECT INDEX

CITATIONS

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In the

United States Circuit Court of Appeals

For the Ninth Circuit.

STANDARD PACKING COMPANY, a corporation,
Appellant,

v.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,
Appellee.

BRIEF FOR THE APPELLEE

Opinions Below

The only previous opinions in the present case are those of the District Court of the United States for the Southern District of California, Central Division, rendered July 27, 1935 (R. 76), entered upon the granting of appellant's application for preliminary injunction herein, and the opinion of said court rendered August 30, 1935 (R. 90), upon granting appellee's motion to vacate said preliminary injunction, neither of which opinions has yet been reported.

Jurisdiction

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the process-

ing of hogs, and is taken from an interlocutory order and decree of the District Court granting appellee's motion to vacate the preliminary injunction which was entered August 30, 1935. (R. 90-91.) The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 14, 1935 (R. 128-129), pursuant to Section 129 of the *Judicial Code*, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether this suit is prohibited by Section 3224 of the *Revised Statutes*.

2. Whether this suit may be maintained where the appellant has a plain, adequate, and complete remedy at law.

3. Whether the bill presents a substantial question on the merits.

Statutes Involved

The applicable provisions of the statutes involved will be found in Appendices A and B, *infra*, pp. 75-101.

Statement

This suit was commenced in the District Court for the Southern District of California, Central Division, on July 2, 1935, by the Standard Packing Company, a corporation, as plaintiff, against Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, as defendants. (R. 4, 65.) From the bill

of complaint (R. 4-65) and the supplement thereto (R. 106-127), it appears that appellant is a California corporation with its principal offices and place of business at Vernon, in said State, where it is engaged in the business of processing hogs within the purview of the Agricultural Adjustment Act (R. 4-5). The appellee Nat Rogan is United States Collector of Internal Revenue at Los Angeles, California. (R. 5.)

At the time of filing the bill of complaint, processing taxes had been assessed against appellant with respect to the processing of hogs during the months of March, April and May, 1935, and at the time of filing the bill of complaint the amounts of such tax which were unpaid, due, owing and payable under the terms of the Agricultural Adjustment Act, as amended, as a result of extensions granted appellant by the Commissioner of Internal Revenue, were due and payable on or before the following dates in the following amounts (R. 16, 38):

May 31, 1935	$6,968.61	Tax for March
June 30, 1935	6,385.90	Tax for April
June 30, 1935	5,980.90	Tax for May,

amounting in the aggregate to $19,335.41, and appellant avers that additional taxes will be assessed against it from month to month thereafter (R. 17, 39).

Appellant avers that it has not paid such taxes and will be unable to pay such additional taxes which may thereafter become due and payable because payment thereof would result in an operating loss in its business to the extent of such payments, and that unless such taxes are paid when due, appellant will become liable to

the imposition of interest and heavy penalties. (R. 16-19, 38-40.) The bill prays for preliminary and thereafter permanent injunction against the appellee, restraining him from collecting or attempting to collect in any manner said taxes from appellant and for declaratory judgment. (R. 51-53.)

As a basis for such injunctive relief, the bill charges that the Agricultural Adjustment Act, as amended, is unconstitutional and the taxes imposed thereunder are illegal, for reasons not here material (R. 21-22, 40-45); hardship, in that appellant has sustained operating losses attributable to the imposition of processing taxes, and that unless the collection of such taxes is enjoined, such operating losses will continue, resulting in a permanent injury to appellant's business and good will (R. 16-18, 47-50); the threat of the imposition of interest and penalties by reason of nonpayment of such taxes and the filing of liens upon the property of appellant and distraint upon such property to enforce the collection of such tax (R. 18-19); that appellant is without an adequate remedy at law in that the tax rate is so high that operating losses would finally exhaust and deplete the assets and working capital of appellant and that it has not the resources to pay the taxes each month and bring action to recover each installment; that there is a threat of a multiplicity of suits and grave doubt as to the value of any judgment which appellant might obtain for the refund of any such taxes (R. 44-45); that at the time of the filing of the bill, there was a threat of removal of appellant's remedy at law to litigate the validity of such tax and the constitutionality of said Act, because there

was pending before the Congress a bill amendatory of the Agricultural Adjustment Act, which purported to deny to a processor the right to bring suit for the refund of processing taxes in the event said Act should be declared unconstitutional (R. 45); all of which appellant asserts would result in irreparable loss and damage (R. 49).

At the time of filing the bill of complaint, appellant filed a motion for preliminary injunction (R. 66), which motion was sustained on July 31, 1935 (R. 81-85). Prior to the hearing on the motion for preliminary injunction, appellee filed a motion to dismiss the bill of complaint (R. 74-75), which motion was denied (R. 76).

Under date of August 22, 1935, appellee filed his motion to vacate the injunction theretofore granted in said cause (R. 87-89), which motion was sustained on August 30, 1935 (R. 90-91). This appeal is from the interlocutory decree sustaining appellee's motion to vacate the preliminary injunction. (R. 128-134.)

Subsequent to the entry of the order sustaining appellee's motion to dissolve said injunction, appellant filed its supplement to bill of complaint and petition for declaratory judgment and injunction (R. 106-127), which pleads the enactment of amendments to the Agricultural Adjustment Act which became effective August 24, 1935, and avers that since the filing of the original bill of complaint, appellant has filed with the appellee as Collector of Internal Revenue returns showing the amount of processing tax payable under the Agricultural Adjustment Act, as amended, with respect to the processing of hogs

during the months of June and July, 1935. The net tax disclosed in said return was $1,360.30 for the month of June, and $2,251.26 for the month of July, which became due and payable on or before July 31, 1935, and August 31, 1935, respectively, and that the amount of tax payable by it with respect to the processing of hogs during the month of August, and which would become payable on or before September 30, 1935, amounted to $2,294.25. The appellant avers that such tax has not been paid, and that had it not been for the preliminary injunction heretofore granted herein, appellee would have proceeded to enforce collection of such tax by summary process including distraint, seizure and sale of appellant's property. (R. 112-113.) The supplemental bill further avers that failure of payment of such taxes will cause appellant to be liable to the imposition of heavy criminal and other penalties. (R. 113.)

The supplemental bill prays for the same relief sought in the original bill of complaint (R. 126), and makes similar charges with respect to the unconstitutionality of the Act and the illegality of the tax imposed thereunder (R. 112-125).

The supplemental bill challenges the constitutionality of the amendments to the Act which were approved and became effective August 24, 1935, for reasons not here material, and charges that such amendments have removed the remedy at law for the recovery of processing taxes, collection of which it seeks to enjoin herein, in the event the Act is declared unconstitutional (R. 115-125), and repeats its averments with respect to threat of multiplicity of suits and its fear that appellee would

be unable to respond in damages in the event appellant should be successful in obtaining judgment against him for the recovery of taxes alleged to have been illegally exacted (R. 122-124).

Notwithstanding its plea of hardship and operating losses sustained because of the imposition of processing taxes, appellant offers to pay into court processing taxes owing by it and such future accruals of taxes as may become due during the pendency of this suit. (R. 124.) An injunction pending appeal has been granted by this Court.

Summary of Argument

The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where, if the party aggrieved cannot obtain satisfaction, there are provisions for recovering the tax, after it is paid, by suit against the collecting officer. The taxpayer has an adequate remedy at law by paying the tax and suing for its recovery. Section 3224 of the *Revised Statutes* prohibits the maintaining of a suit in any court to enjoin the collection of a tax.

The bill of complaint fails to show that appellant has such right, title or interest in the funds representing the tax sought to be enjoined, as would permit appellant to seek injunctive relief in this proceeding. One who pleads unconstitutionality must show that the burden of the tax has been actually borne by him and not by another; he must show how the feature complained of does

specific injury to him and deprives him of his constitutional rights. If the taxes described in the bill and sought to be enjoined are actually borne by others, then such others are the real parties in interest. Since it does not appear that any injury has or may result to appellant, it has no right to maintain this proceeding.

The Court will examine the record for the purpose of determining whether the suit can be maintained, and upon finding that the proceeding has been erroneously commenced, will dismiss the bill. Upon an appeal from an interlocutory order, the power of the Court is limited to consideration of and action upon the order appealed from; but if it appears that the Court is without power to grant the relief prayed for, the bill may be dismissed and the litigation terminated. The constitutionality of a revenue measure may not be tested in an injunction proceeding, and the Declaratory Judgment Act cannot be invoked in any proceeding involving Federal taxes. This proceeding is prohibited by the Declaratory Judgment Act, as amended, and cannot be maintained.

Argument

Appellant has devoted the greater portion of its bill of complaint to a challenge of the constitutionality of the Agricultural Adjustment Act and to the validity of the processing taxes imposed by the Congress. Neither of these questions is material to a consideration of the questions presented by either the motion for preliminary injunction filed by the appellant (R. 66), the motion to dismiss the bill of complaint (R. 74), or the motion to

dissolve the preliminary injunction (R. 87), both filed by the appellee. It is firmly established that the constitutionality of a taxing statute may not be tested in a suit for injunction. *Bailey v. George,* 259 U. S. 16. It is likewise definitely settled that the validity of a tax cannot be challenged until it has first been paid. *Nichols v. United States,* 7 Wall. 122; *State Railroad Tax Cases,* 92 U. S. 575; *Snyder v. Marks,* 109 U. S. 189; *Corbus v. Gold Mining Co.,* 187 U. S. 455; *Dodge v. Osborn,* 240 U. S. 118; *Graham v. duPont,* 262 U. S. 234. The doctrine of "pay first and litigate later" is an elementary principle in our field of taxation. Therefore, neither the constitutionality of the Act, nor the validity of the tax will be considered in this brief.

I.

THE BILL OF COMPLAINT FAILS TO SET FORTH FACTS SUFFICIENT TO ENTITLE APPELLANT TO THE RELIEF PRAYED FOR.

1. The Maintenance of This Suit Is Prohibited by Statute

The right of a litigant to injunctive relief must stand or fall upon the sufficiency of the averments in the bill of complaint to show the existence of such special and extraordinary circumstances as are sufficient to bring the case within some acknowledged head of equity jurisprudence. The sufficiency of the bill herein is challenged. It is urged that such bill sets forth no facts, which, if true, would entitle appellant to the relief prayed for in

a court of equity, or to any injunctive relief in this cause. In view of these considerations, the court below denied appellant's motion for a preliminary injunction.

The statutes challenged by appellant impose taxes. It has been repeatedly announced by the Supreme Court as a fundamental principle of taxation that all governments have found it necessary to adopt stringent methods for the collection of taxes and to be rigid in their enforcement. The revenue measures of this country constitute a system which provides for their enforcement by officers commissioned for that purpose. This system provides safeguards of its own against mistake, injustice, or oppression, in the administration of such revenue laws. Appeals are allowed to specified tribunals as the lawmakers deem expedient. Remedies are also provided for recovering taxes which may have been exacted illegally. These factors prompt the courts to deny injunctive relief where a taxpayer has failed to exhaust his legal remedies. *Graham v. duPont*, 262 U. S. 234, 254-255; *Bailey v. George*, 259 U. S. 16, 20; *Dodge v. Osborn*, 240 U. S. 118, 121; *Snyder v. Marks*, 109 U. S. 189, 191-193; *State Railroad Tax Cases*, 92 U. S. 575, 615. This principle is given statutory effect in Section 267 of the *Judicial Code*, *infra*, p. 75.

As a further barrier to the prosecution of suits to enjoin the collection of taxes, the Congress has provided by Section 3224, *Revised Statutes*, *infra*, p. 76, that—

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (*U. S. C.*, Title 26, Sec. 1543.)

The principal reason for such a provision, as the Supreme Court has pointed out in *Miller v. Nut Margarine Co.*, 284 U. S. 498, 509—

> "is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government."

The enactment of that section fortified the policy which requires that the Government shall not be impeded in the regular procedure adopted by the Congress for the important function of collecting the revenues required to maintain the Government. As so clearly stated by Mr. Justice Brandeis, in *Phillips v. Commissioner*, 283 U. S. 589, 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of the pecuniary obligations to the government have been consistently sustained. * * * Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, * * *, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of

property rights if the exaction is made under color of their offices by revenue officers, charged with the general authority to assess and collect the revenue. * * * This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, §604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in §280, and involving less directly the obligation of the taxpayer, were sustained in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272. It is urged that the decision in the *Murray* case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * *Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.* * * * " (Italics supplied.)

And again (p. 599):

" * * * *it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount.*" (Italics supplied.)

In *Cheatham v. United States*, 92 U. S. 85, cited with approval and followed by the Court in *Phillips v. Commissioner*, supra, Mr. Justice Miller, speaking for the Court, said (pp. 88-89):

"It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

"If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows v. The City of Chicago,* 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, *the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed.* * * * " (Italics supplied.)

The effect of Section 3224, as construed and applied by the Supreme Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection cannot be stayed by injunction. *Phillips v. Commissioner*, supra; *Graham v. duPont*, supra; *Bailey v. George*, supra; *Dodge v. Brady*, 240 U. S. 122; *Dodge v. Osborn*, supra; *Corbus v. Gold Mining Co.*, 187 U. S. 455, 464; *Pacific Whaling Co. v. United States*, 187 U. S. 447, 451-453; *Snyder v. Marks*, supra; *State Railroad Tax Cases*, supra; *Cheatham v. United States*, supra.

The bill which appellant has filed shows nothing which removes the case from the inhibitions of the statute. It is averred that the Agricultural Adjustment Act is unconstitutional; yet the Supreme Court has uniformly held that even though the Act imposing the tax is unconstitutional, that does not afford a basis for injunctive relief. *Dodge v. Osborn,* supra; *Dodge v. Brady,* supra; *Bailey v. George,* supra. An injunction against the collection of the child labor tax was denied in *Bailey v. George,* supra, on the same day in which the Supreme Court in *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, held the Child Labor Tax Act unconstitutional.

Appellant also asserts that the tax sought to be enjoined is illegal, and charges that "it is not a tax within the meaning of the Constitution" (R. 22, 43), and that "said so-called taxes are not in fact or in law taxes" (R. 114). This challenge is unanswerably settled by the Supreme Court in *Snyder v. Marks,* supra, where it is said (pp. 192-193):

> *"Hence, when, on the addition to the section, a 'tax' was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in Section 3224. There is, therefore, no force in the suggestion that Section 3224, in speaking of a 'tax,' means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.*
>
> * * * * *

> "The inhibition of Section 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. *The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.* Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law." (Italics supplied.)

Section 3224 was enacted in its present form in 1867, and it is significant that during all of the sixty-eight years the statute has been effective, the Supreme Court has not sustained an injunction in any case involving a tax imposed by a revenue measure of the United States. Appellant relies with confidence upon *Miller v. Nut Margarine Co.*, supra, as a basis for sustaining its right to injunctive relief. There the plaintiff had sold a product not taxable under the Oleomargarine Act in reliance upon determination by the courts and the Commissioner of Internal Revenue interpreting the Act as inapplicable in like cases and upon assurance from the Bureau of Internal Revenue that its product would not be taxed. After the plaintiff had been engaged in the manufacture and sale of its product for many months, the Commissioner changed his ruling, and while not attempting to collect from other makers of like products who had obtained injunctions in which he had acquiesced and which had become final, directed that the tax be enforced against the plaintiff's entire product from the beginning.

This would have destroyed the business, ruined the plaintiff financially and inflicted loss without remedy at law. Upon such a state of facts the Court held that there existed "extraordinary and exceptional circumstances" which made Section 3224 inapplicable. No circumstances have been recognized by the Supreme Court in any injunction case seeking to restrain the collection of a tax imposed by Congress as being sufficient to authorize injunctive relief. None of the averments relied upon by appellant as a basis for equitable relief meet the test imposed by Mr. Justice Butler, in *Miller v. Nut Margarine Co.*, supra.

All of the other cases in which Section 3224 has been held inapplicable by the Supreme Court, including those relied upon by appellant, have been carefully distinguished by Chief Justice Taft in *Graham v. duPont*, supra, where he said (pp. 257-258):

> "The cases complainant's counsel rely on do not apply. The cases of *Lipke v. Lederer*, 259 U. S. 557, and *Regal Drug Corporation v. Wardell*, 260 U. S. 386, were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, were suits by stockholders against corporations to restrain the corporations from paying taxes alleged to be unconstitutional. *Hill v. Wallace*, 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of

> Trade designated as a 'contract market' under the Future Trading Act on the ground that the Act was unconstitutional and its operation would impair the value of the board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the board and to sue to recover them back, would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured, not only the members of the board, but also the producing and consuming public. This phase of the situation was so clear that the government in effect consented to the temporary injunction. See *Hill v. Wallace*, 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that Section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the Act was unconstitutional. *Hill v. Wallace*, should, in fact, be classed with *Lipke v. Lederer*, supra, as a penalty in the form of a tax. Certainly we have no such case here."

All of the results predicted by appellant in its bill can be avoided by payment of the tax sought to be enjoined. If appellant deliberately violates the provisions of the Act with respect to the making of returns and the payment of taxes, it is in no different position than if it

deliberately violates any other law of the land. It must take the consequences of its own rash act.

Neither anticipation of a multiplicity of suits (*Dodge v. Osborn*, supra; *Pacific Whaling Co. v. United States*, supra; *City of Seattle v. Poe*, 4 F. (2d) 276 (W. D. Wash.)); injustice, hardship, irregularity, or inconvenience (*State Railroad Tax Cases*, supra; *Reinecke v. Peacock*, 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S. 699); danger of loss of credit or inability to pay because of lack of funds (*Thornhill Wagon Co. v. Noel*, 17 F. (2d) 407 (E. D. Va.)); or that the tax is confiscatory, or too high (*Broadway Blending Corp. v. Sugden*, 2 Fed. Supp. 837, 839 (W. D. N. Y.); see also *McCray v. United States*, 195 U. S. 27); may be made the basis for injunctive relief.

It is submitted that due consideration of the grounds urged as exceptional by appellant do not justify a finding that the situation of appellant presents other or different hardships than quite frequently result, and which are more or less inherent, in cases of the exercise of the sovereign power to lay and collect taxes. That irreparable injury may threaten and come, if injunction is denied, furnishes no occasion for the exercise of a nonexistent judicial power. Neither does the alleged fact of an unsatisfactory or burdensome legal remedy to recover the taxes asserted to be wrongfully or illegally exacted justify the overriding of the express prohibition of the statute.

Lastly, it is averred, as evidence of irreparable loss, that the pendency of the measure in Congress denying

the right to litigate the validity of the taxes already paid and those sought to be enjoined is a basis for injunctive relief. Such a contention is and was insufficient as a circumstance to take this case out of the scope of Section 3224. Courts must apply the law as it exists and not as it is apprehended that it may in the uncertain future be made to provide. *Untermeyer v. Anderson*, 276 U. S. 440, 446. This same question was under consideration recently by this Court in *Fisher Flouring Mills Co. v. Vierhus*, 78 F. (2d) 889, and two companion cases, in which the District Court of the United States for the Western District of Washington had overruled motions for preliminary injunctions and had entered orders dismissing the bills of complaint. After appealing from the interlocutory decrees denying preliminary injunctions, the complainants below applied to this Court for injunctions pending their respective appeals. At the hearing injunctions were denied by this Court, and the reasons for so doing are clearly set forth in the opinion. In commenting upon the alleged threat of removal of the remedy at law by amendments to the Agricultural Adjustment Act, then pending before Congress, this Court said (p. 892):

> "It would be a strange procedure for a court of chancery to measure the adequacy of a remedy at law, not by what the law is at the time the equity suit is filed, but by certain nebulous conjectures of what the law *may* be at some future time. 'Jurisdiction is determined as of the time the suit was commenced.' *Pacific Telephone and Telegraph Co. v. City of Seattle*, 14 F. (2d) 877, 879. 'Equity acts in the present tense.' *Continental Securities Co.*

> *v. Interborough R. T. Co.* (D. C.), 207 F. 467, 471, affirmed 221 F. 44 (C. C. A. 2). The appellants had at the time of the commencement of these suits, and still have, a plain, adequate and complete remedy at law. Equity is not to be frightened into assuming jurisdiction by the bugaboo of dire prophecies of what the law *may* be in the future. 'To grant an injunction in anticipation of a possible injury to arise under a law that may never be passed, is, to say the least, unusual. What complainant's rights may be, and what relief should be afforded him in the event of the passage of such a law as he contemplates, cannot now be anticipated.' *Ryan v. Williams* (C. C.), 100 F. 172, 175. It would be an unwarranted encroachment by the judiciary upon the legislative branch of the government 'should the court attempt a race of diligence with Congress to defeat the applicability of an Act to a pending case.' *La Croix v. United States* (D. C. W. D. Tenn.), decided July 27, 1935, reported in 11 F. Supp. 817. We are unanimously of the opinion that this court should not be governed or influenced in its action by speculations or predictions regarding future Congressional enactments." (Italics supplied.)

Instances are of rare occurrence in which litigants have sought to rely upon threats alleged to exist by reason of pending legislation as a basis for equitable relief. In fact, it appears that there are but two reported cases, in addition to *Ryan v. Williams*, 100 Fed. 172 (E. D. Va.), cited by this Court in its opinion, supra, which are at all similar. Both of these cases entirely support the views expressed by this Court in *Fisher Flouring*

Mills Co. v. Vierhus, supra. In *Molson v. Montreal,* 23 Lower Canada Jurist 169 (Court of Queen's Bench), it appears that a statute of the Province of Quebec had authorized governing bodies of cities to subscribe for stock in such railway companies as they might deem for the interest of their particular city. The common council of Montreal had passed a by-law enabling the mayor to subscribe for stock in a certain railroad corporation. Before becoming effective such by-law was subject to the approval of the municipal electors. Before a vote was taken upon the by-law, a bill for injunction was filed by a municipal elector and property owner against the mayor and common council of Montreal, praying that the defendants and their officers be ordered to abstain from taking a vote of the electors. The court affirmed a decree dismissing the bill, stating (p. 172):

> "In the present case the appellant does not show by his declaration that he has actually suffered any injury. The pretended by-law is yet but a project. It can only take effect by the approval of the municipal electors, who may reject it, and therefore it may never become operative. *There is yet no injury done, no wrong to be remedied, and the appellant's action is altogether premature."* (Italics supplied.)

In *Roudanez v. Mayor, et al., of New Orleans,* 29 La. Ann. Rep. 271, the Supreme Court of Louisiana said (p. 272):

> "The question therefore presented for our decision is, can the plaintiffs, citizens and taxpayers of New Orleans, alleging that the defendants, the

mayor and administrators of the city, are about to hold an election to decide upon the levying of a tax under Act 20 of 1876, and that that act is unconstitutional, and that any tax levied by virtue thereof will be illegal and void, restrain and enjoin them from so proceeding?

"It is not pretended that any tax has been levied or is demanded of the plaintiffs. Nor is it even asserted that such tax will be levied, but only that it may be the result of the proposed election.

"We think that the danger apprehended is too remote and too contingent to form the basis of a proceeding in court to avert it.

"*Courts of justice have enough to do in dealing with real, existing, and present wrongs, without anticipating and combatting hypothetical evils of the future that may or may not arise. It will be time enough for the plaintiffs to complain when their rights are actually invaded, or when danger to their persons or property is imminent and impending.* There are too many contingencies at present between them and danger to justify them in resorting to law. Act No. 20 may yet be repealed, or the tax proposed may be voted down, or plaintiffs may cease to be taxpayers, or the railroad corporation may cease to exist, or forfeit its charter." (Italics supplied.)

At the time of the filing of the bill of complaint herein, adequate provision had already been made under Sections 3228, 3220, and 3226 of the *Revised Statutes*, as amended, *infra*, pp. 85-86, under which claims for the refunding of excise taxes alleged to have been illegally exacted, could be presented to the Commissioner of In-

ternal Revenue at any time within four years, or forty-eight months, after the payment of such disputed exactions, whereby appellant might join its payments of taxes for many months in one suit at law in the event the Commissioner should reject such claims for refund in whole or in part. Furthermore, the recent amendatory legislation to the Agricultural Adjustment Act contains none of the provisions complained of in the bill of complaint as an alleged threat to remove from appellant its remedy at law. On the contrary, Section 21 (g) of the *Agricultural Adjustment Act,* as now amended, *infra,* p. 85, expressly authorizes the Commissioner of Internal Revenue to entertain and allow claims for refund of processing taxes and expressly makes Section 3226 of the *Revised Statutes*, as amended, applicable to claims for refund and claims for credit with respect to processing taxes, and said Section 21 of said Act, as now amended, *infra*, p. 78, contains full, adequate and complete provisions for suits at law to recover any processing taxes which the Commissioner of Internal Revenue has refused to refund and which may have been exacted illegally.

If there is any reason why appellant should litigate the merits of the questions presented in its bill, it should make payment of the tax and bring an action in the proper court for its recovery. This ordinary remedy is both adequate and simple. No special and exceptional circumstances are suggested adequate to justify the extraordinary remedy of enjoining the Collector. Even in the enforcement of the collection of state taxes, where Section 3224, *Revised Statutes,* is unavailing, the Su-

preme Court has denied injunctive relief where an adequate remedy at law exists. *Matthews v. Rodgers,* 284 U. S. 521; *Stratton v. St. L. S. W. Ry.,* 284 U. S. 530.

In *State Railroad Tax Cases,* 92 U. S. 575, supra, the Supreme Court said (p. 613):

> "The government of the United States has provided both, in the customs and in the internal revenue, a complete system of corrective justice in regard to *all taxes imposed by the general government,* which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. *But there is no place in this system for an application to a court of justice until after the money is paid.*" (Italics supplied.)

However, as has already been shown, the court below was without power to grant injunctive relief in view of the inhibitions of Section 3224, *Revised Statutes,* and Section 267 of the *Judicial Code.* An analogous situation arose in *Smallwood v. Gallardo,* 275 U. S. 56, where suits were brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. The cases were heard in the District Court and dismissed on the merits. The decision of the District Court was affirmed by the United States Circuit Court of Appeals for the First Circuit. After the decision by the Circuit Court of Appeals and before writs of certiorari were granted by the

Supreme Court, the Congress enacted a statute which provided—

> "That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Because of the passage by Congress of an Act which took away the jurisdiction of the District Court in this class of cases, the Supreme Court reversed the decisions of the courts below and sent the cases back with directions to dismiss for want of jurisdiction.

2. Neither Hardship Nor Injustice May be Made the Basis For Injunctive Relief

Appellant urges as an exceptional circumstance that the continued payment of the tax, collection of which is sought to be enjoined, will result in undue hardship, and charges that "the business of said plaintiff in its packing of pork cannot endure or make such payments and continue to carry on such business, for the reason that the working capital allotted to such pork department of necessity will from time to time grow less and less and finally become entirely depleted." (R. 15-16, 37-38.) This contention is effectively answered by the Supreme Court in *State Railroad Tax Cases*, 92 U. S. 575, 614, in which Mr. Justice Miller, speaking for the Court, said:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within

some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or *hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.* One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitution of all the States, and by the theory of our English origin, is exclusively legislative. *Heine v. The Levee Commissioners*, 19 Wall. 660." (Italics supplied.)

In *Thornhill Wagon Co. v. Noel*, 17 F. (2d) 407 (E.D. Va.), the court refused to enjoin the enforcement of a levy under a warrant for distraint for Federal income and profits taxes, where complainant had alleged (p. 408) "that it was without funds at hand to satisfy the demand, and that it would have been destructive of its credit and business to have submitted to the avertisement of its personal property, and that, under this duress, it signed the waiver" extending the period for assessment of the tax.

There could perhaps be no greater hardship inflicted upon a taxpayer then to take from him his homestead. Yet in *Staley v. Hopkins*, 9 F. (2d) 976 (N. D. Tex.), the court dismissed the bill of complaint to enjoin the sale

of a homestead in a suit brought by a Collector of Internal Revenue to pay income tax levied against the plaintiff's wife.

Gouge v. Hart, 250 Fed. 802 (W. D. Va.), writ of error dismissed, 251 U. S. 542, was a suit to set aside a sale made pursuant to distraint proceedings, in which the Collector of Internal Revenue had bid in for the United States a portion of the real estate which had been levied upon. In dismissing the bill of complaint the court gave effect to Section 3224, Revised Statutes, holding that the word "restraining" as appearing in that Section is used in its broad popular sense of hindering or impeding, as well as prohibiting or staying, and that the statute is not limited in its application to suits for injunctive relief. As its reasons for holding that complainant could not maintain a suit to set aside and annul the sale, the court said (p. 805):

> "The language used in the *Nichols, Cheatham, Snyder, Whaling Co.*, and *Dodge* cases, *supra* (in addition to which see *U. S. v. Pacific R. Co.*, 27 Fed. Cas. 397, and *Calkins v. Smietanka* [D. C.] 240 Fed. 138, 146) shows, as it seems to me, that the Supreme Court has, arguendo, construed section 3224 as forbidding such suit as we have here. The statements that sections 3224, 3226, and 3227 (Comp. St. 1916 §§5947, 5949, 5950) set forth a "complete system of relief," and one that is "exclusive of all other relief," can be explained, as I think, on no other theory. And it must be admitted that these repeated expressions of opinion, not dropped unthinkingly in passing, but uttered as the result of careful consideration, are so highly persuasive as to be almost binding.

None but the most cogent and compelling reasons for a different construction of the statute would justify this court in adopting another construction. Instead of finding cogent reasons for restricting the statute to bills for injunction, it seems to me that the stronger reasons lead to the broader construction:

"(a) The necessity for freedom by the executive officers of the government from judicial interference in the matter of collecting taxes is so obvious, and the hardships occasionally thus imposed on taxpayers are so unimportant in comparison with the evil results of having the collection of taxes delayed by appeals to the courts, that it would seem rather clear from such considerations alone that Congress used the word "restraining" in section 3224 in its popular and broad sense, rather than in a technical and very narrow sense. And I have been unable to conceive of any good reason for an intent to prohibit injunction suits, while leaving open to the taxpayer other forms of equitable relief from a tax still in the process of being collected. To nullify a purchase of land by the government in an effort to collect taxes would embarrass the government, practically speaking, about as much as to enjoin the sale. Such striking inefficiency in legislation suggests strongly a too narrow construction of the language used."

In commenting upon the effect of hardship as a basis for equitable relief, the court said (p. 806):

"(d) The remarkable scarcity (even if not entire absence) of reported cases in which was asked the relief (against federal taxes) here asked would seem to indicate a general concurrence on the part of the bar in the theory that section 3224 forbids, not only injunctions, but also other forms of direct

equitable relief. It is true that, where the taxpayer is impecunious and the tax assessed is very large in amount, the remedy afforded by paying the tax and then suing to recover the amount paid may involve great hardship. But many laws (for instance, all criminal laws imposing fines) may operate much more harshly on the poor than on the well-to-do. And the imposition of taxes may involve occasionally the most extreme hardships in isolated cases, without affording a good reason for a strained construction of a statute. In *Pacific Steam Whaling Co. v. U. S.*, *supra*, 187 U. S. 447, 452, 23 Sup. Ct. 154, 156 (47 L. Ed. 253) it is said:

" 'It is said that, unless this application can be sustained, the petition is without remedy, and that there is no wrong without a remedy. While as a general statement this may be true, it does not follow that it is without exceptions, and especially does it not follow that such remedy must always be obtainable in the courts. Indeed, as the government cannot be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department.

" 'While it is true that ambiguous statutes are not readily so construed as to bring about general inconvenience or hardship, this doctrine does not seem to apply here. It must be apparent that a tax in excess of, or even approaching, the value of the taxpayer's property, will be very seldom assessed, and practically speaking never assessed, except where based on the ground of an alleged extensive violation of the internal revenue or custom laws. Usually, therefore, the taxpayer's property will afford a sufficient basis of credit to enable him to borrow and pay

the taxes, as preliminary to an action to recover the money.

* * * * *

"'It may possibly be, in view of Act March 4, 1913, c. 166, 37 Stat. 1016 (6 U. S. Comp. Stats. Ann. §5908), amending section 3186, Rev. Stats., that the government had never had a lien as against Mrs. Gouge and Campbell, trustee. But I do not see that the hardship inflicted on them by the acts of the tax officers is greater than that inflicted on Gouge—if the tax be as invalid and as unjust as complainants allege. And the power of the court does not depend upon the severity of the hardships complained of. If a statute forbids the maintenance of this suit, such fact makes an end of discussion. And section 3224 may—to my mind does—forbid this suit, notwithstanding the great, but temporary hardships alleged.'"

Although appellant relies upon an averment of hardship as a basis for equitable relief, the bill does not disclose that appellant has exhausted the relief from such hardship afforded by the Agricultural Adjustment Act, for it is specifically provided in Section 19(c) of said Act that—

"In order that the payment of taxes under this title may not impose any immediate undue financial burden upon processors or distributors, any processor or distributor subject to such taxes shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act."

Said provision existed in said Act at the time of the filing of the bill of complaint herein and still remains

unchanged, whereby appellant may not complain of any hardships resulting from the payment of the tax, sought to be enjoined.

Since an averment of hardship does not afford a basis for injunctive relief, and since the bill of complaint sets forth no facts which remove this suit from the inhibitions of Section 3224, Revised Statutes, the court below rightly concluded that it was without power to grant injunctive relief.

3. The Threat of a Multiplicity of Suits is Wholly Illusory

Appellant urges as a basis for equitable relief that there is grave danger of a multiplicity of suits in case injunctive relief is denied. This contention is supported by the statement that it will be necessary to institute separate suits for the recovery of the tax paid for each month. There is no basis, either in fact or in law, for such a contention. Unless the Act should be declared unconstitutional, there will be no basis for any suits whatsoever. If the Act should be declared unconstitutional, one claim for refund and one suit for the recovery of all taxes which may have been paid by appellant is all that will be necessary.

A similar contention was before the Court in *Matthews v. Rodgers, supra*. There the Court entered into a learned discussion of the history of equity jurisdiction, as applied to tax litigation, and in commenting upon the alleged threat of a multiplicity of suits, said (pp. 529-530):

> "Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity

of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Water Co. v. Boise City*, 213 U. S. 276, 285-286; *Dalton Adding Machine Co. v. State Corporation Comm.*, 236 U. S. 699, 700-701.

"But it is said that since each appellee must pay the tax to avoid penalties and criminal prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted, in order to protect their federal rights, and that to avoid the necessity of the many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

"In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, 375; *Kelley v. Gill*, 245 U. S. 116, 120; *Francis v. Flinn*, 118 U. S. 385; *Scott v. Donald*, 165 U. S. 107, 115; *Hale v. Allinson*, 188 U. S. 56, 77 *et seq.*; and see Pomeroy, Equity Jurisprudence (4th ed. 1918), §§251, 251½, 255, 259, 268.

"While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to

be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity."

The language of this Court in *Fisher Flouring Mills Co. v. Vierhus, supra*, with respect to a similar contention as to the danger of multiplicity of suits is equally pertinent. See *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 286; *City of Seattle v. Poe*, 4 F. (2d) 276 (W. D. Wash.). It follows that multiplicity does not exist where it consists merely of a series of suits by the same litigant, involving the same question, in any one of which suits the matter at issue could be determined. The consideration which governs courts of equity in intervening in order to present multiplicity of suits does not enter here.

4. Absence of a Remedy at Law Does Not Make Inapplicable the Provisions of Section 3224, Revised Statutes, or Section 21 (a) of the Agricultural Adjustment Act, as Amended.

Appellant charges that the amendments to the Agricultural Adjustment Act which became effective August 24, 1935, deprive it of an adequate remedy at law, and asserts that there are thereby created such extraordinary and exceptional circumstances as to justify the granting of injunctive relief. The Supreme Court has never held in

any case dealing with the application of Section 3224, Revised Statutes, in its prohibition of injunctive relief from the exaction of a tax imposed by the Congress, that the absence of a remedy at law for the recovery of taxes alleged to have been illegally exacted is such an extraordinary and exceptional circumstance as to render the provisions of Section 3224, Revised Statutes, inapplicable. On the contrary, in at least two cases which have never been distinguished, criticized, or reversed, the Supreme Court has denied injunctive relief in spite of the showing of an entire and absolute absence of a remedy at law. *Graham v. duPont, supra; Pacific Whaling Co. v. United States, supra.*

Moreover, the same reasons which deny to appellant the right to challenge the constitutionality of the Agricultural Adjustment Act or the validity of the tax imposed by the Congress thereunder in this suit apply with equal force to its rights to challenge in this suit the constitutionality of the amendments to the Act. Appellant vigorously assails the constitutionality of Section 21 of the amendatory legislation, and particularly subdivisions (a) and (d) of the Section.

Having in mind the right of the Government to prescribe the conditions on which it will subject itself and its officers to the judgment of the courts in the collection of its revenues (*Cheatham v. United States, supra*), and recognizing the imperative necessity for prompt collection of the revenue imposed under the Agricultural Adjustment Act, the Congress incorporated in the amendatory legislation certain procedural and remedial provisions.

a. Section 21(a) Does Not Deprive Appellant of Any Vested Rights

Section 21(a) of the Act broadens the scope of Section 3224 of the Revised Statutes, and is a specific prohibition against granting injunctive relief with respect to the collection of processing taxes imposed by the Agricultural Adjustment Act.

There is no doubt as to the power of Congress to limit the jurisdiction of the courts which it has created. *Cary v. Curtis*, 3 How. 235. Under Section 1 of Article III of the Constitution, Congress is granted the power to ordain and establish inferior courts. There is no presumption in favor of the jurisdiction of any such courts. In fact every presumption is against jurisdiction. *Young v. Main*, 72 F. (2d) 640, (C.C.A. 8th); *Robertson v. Cease*, 97 U. S. 646. Congress may grant, withhold, or restrict such jurisdiction at its discretion. In commenting on this power of Congress in *Kline v. Burke Constr. Co.*, 260 U. S. 226, the Court said (pp. 233-234):

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Turner v. Bank of North America, 4 Dall. 8, 10; *United States v. Hudson & Goodwin,* 7 Cranch, 32; *Sheldon v. Sill,* 8 How. 441, 448; *Stevenson v. Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor v. Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right. * * *"

Since there is no vested right to an injunction against collecting taxes claimed to have been illegally exacted (*Smallwood v. Gallardo, supra*), appellant cannot complain because of the provisions of Section 21(a). This section completely divests the courts of power to enjoin the collection of processing taxes imposed on or after August 24, 1935.

b. Section 21 (d) Affords an Adequate Remedy at Law

Section 21(d) of the amendatory legislation is made the basis of a special attack by appellant. The validity of the section is challenged as being repugnant to the due process clause of the Constitution, in that it is charged appellant's remedy at law has been removed. To sustain

its contentions, appellant persists in placing upon the Section impossible and unreasonable interpretations resulting in a construction of the provisions of the Section most adversely to itself. Statutes levying taxes are not extended by implication beyond the clear import of the language used, and in case of doubt are construed most strongly against the Government. *Gould v. Gould,* 245 U. S. 151; *Hecht v. Malley,* 265 U. S. 144; *Helvering v. Stockholms &c. Bank,* 293 U. S. 84, 93. In the cases already referred to, it has been shown that the Supreme Court has held repeatedly that where a statute provides a method for the recovery of a tax, in case of illegality, the remedy is exclusive. Section 21(d) affords such a remedy. Even if the remedy so afforded is inadequate, it is urged that the court is without jurisdiction in equity. The validity of the Section may be tested in a suit at law. *United States v. Jefferson Electric Co.,* 291 U. S. 386.

It seems clear that Section 21(d) affords an adequate remedy and that its constitutionality must be sustained. If the Act should ultimately be held unconstitutional, the Section clearly provides that any amount of the tax as to which appellant has borne the burden should be refunded to him. The Section is not subject to the strained construction contended for by appellant, to the effect that it may not recover any part of the tax unless it shows that it has borne the burden of the whole of it. It is apparent from the text that "passed on any part of such amount" and related clauses refers to the amount to be refunded. In other words *any* amount which has not been "passed on" or "passed back" shall be refunded. The discussion

on the floor of the Senate discloses that Congress intended that the Section should be given a fair and liberal interpretation. Cong. Rec., Vol. 79, No. 169, pp. 13700-13702, Appendix B, *infra*, p. 97.

The Act under consideration has always contained adequate provisions for the administrative consideration of claims for the refund of processing taxes alleged to have been illegally exacted and for suit at law in the event of rejection of such claims for refund in whole or in part. Sections 19 (b) and 21 (g) of the Act make applicable Sections 3220, 3226, and 3228, *Revised Statutes* (Appendix B, *infra*, p. 85), and afford to appellant all of the remedies which any taxpayer has ever had for the recovery of taxes erroneously or illegally collected or for testing the validity of the tax in controversy. Section 21 (d) has not deprived appellant of any of these remedies, but has merely prescribed the procedure to be followed requisite to the filing of suit for the recovery of the controverted tax, and in line with unbroken precedent requires the claimant to show that he is in fact the taxpayer and entitled to repayment of the exaction. The principle so incorporated in the statute is but legislative recognition of the rule which requires any taxpayer to sustain the burden of proving that he has in fact sustained the burden of the tax, else he may not recover. *White v. Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, October 14, 1935; *Champ Spring Co. v. United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Standard Oil Co. v. United States*, 5 Fed. Supp. 976, 985 (C. Cls.).

This same principle was recognized by this Court in *Fisher Flouring Mills Co. v. Vierhus,* supra.

Nor is this the first legislation where Congress has recognized that the burden of an excise is generally borne by the consumer. Familiar examples appear with respect to certain manufacturers' excise taxes where Congress has provided in instances where agreements or contracts have been entered into prior to the effective date of the tax for the sale or lease of an article subject to the tax, any new or additional liability must be discharged by the purchaser, while any reduction in liability shall be recovered by the purchaser.[1] When it developed as the result of extensive litigation that the Government had probably collected substantial amounts under Section 900 (3) of the *Revenue Acts of 1918* and *1921*, and Section 600 (3) of the *Revenue Act of 1924,* as taxes upon the sale of articles not properly taxable under those sections. Congress sought to prevent any unjust enrichment to taxpayers seeking refunds where the burden of the tax had been shifted to the consumer.

In making appropriations in 1927 and 1928 for the refund of internal revenue taxes erroneously and ille-

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[1]See Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 1007; Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1312; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 906; Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 605; Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 603; Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 423; Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 625, as amended by Pub. Res. No. 25, approved June 13, 1932, c. 246, 47 Stat. 302. For administrative recognition of this feature respecting excises, see Regulations 47, Articles 3 and 40, under the Revenue Act of 1921; Regulations 48, Article 1, under the Revenue Act of 1924; Regulations 52, Articles 8 and 34, under the Revenue Acts of 1918 and 1921; and Regulations 54, Articles 6 and 35, under Revenue Act of 1921.

gally collected, Congress provided that no part of such appropriations should be available to refund any amount collected under those sections unless the taxpayer should furnish a bond conditioned upon the repayment to the Government of any amount of such refund not distributed within six months to the person who purchased for consumption the article upon which the refund was made.[2] These provisions were adopted only as a temporary expedient until Congress could deal with the subject properly.[3] They were soon superseded by Section 424 of the *Revenue Act of 1928* which provided, *inter alia*, that no refund of taxes imposed by Section 900 (3) of the 1918 and 1921 Acts or Section 600 (3) of the 1924 Act should be made unless it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, had been returned to him.

In this respect Section 21 (d) goes no further than Section 424 of the Revenue Act of 1928, and Section 621 of the Revenue Act of 1932. It is, indeed, patterned directly after those sections. Such provisions, in effect, embody a presumption that the tax has been passed on. As to excise taxes, this is a reasonable presumption of fact, being founded upon experience and backed by economic authorities. It is not conclusive, but is rebuttable.

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[2]See c. 226, 44 Stat. 1250, 1254; c. 5, 45 Stat. 12, 30; c. 126, 45 Stat. 162, 169.

[3]See H. Rep. No. 2, 70th Cong., 1st Sess., p. 27.

It is therefore legally unobjectionable. See *Schlesinger v. Wisconsin,* 270 U. S. 230; *Heiner v. Donnan,* 285 U. S. 312. The similar presumptions in the Revenue Acts of 1928 and 1932 have been uniformly upheld by the courts. *United States v. Jefferson Electric Co.,* supra; *Jefferson Electric Mfg. Co. v. United States,* 10 Fed. Supp. 950 (C. Cls.); *Virginia-Carolina Rubber Co. v. United States,* 7 Fed. Supp. 299 (C. Cls.).

In *United States v. Jefferson Electric Co.,* supra, the Court said (pp. 402-403):

> "But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
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> * * * * *
>
> "The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:
>
> "This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex acquo et bono* belongs to the plaintiff. It

> was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."

Appellant insists that the burden of proof required by Section 21 (d) is impossible to sustain; that the difficulties are insuperable; and being impossible of being complied with, is invalid. This requirement in Section 21 (d) is severable from the remainder of the Act. If it falls because of impossibility of compliance, then the procedure for the prosecution of claims for refund provided in other sections of the Act and at common law become absolute. The position taken by appellant and other processor litigants is that no processor can prove whether, or to what extent it has borne the burden of the tax. Whether appellant or any other individual processor has borne the burden of the tax is a question of fact. Whether evidence submitted in proof of such fact is sufficient is a question of law.

Representations made by appellant for the purpose of supporting its contentions that this essential fact is not susceptible of proof are therefore merely conclusions and without basis in fact. On the contrary it may easily be demonstrated that such arguments are wholly unsound. By Section 15 (c) of the Act processed commodities sold to any organization for charitable distribution or use, or to any state or Federal welfare organization, for its own use, are exempt from the imposition of the tax, and provision is made for the refund or

credit of the amount of any tax paid upon such tax exempt commodities. By Section 17 (a) of the Act it is provided that upon the exportation to any foreign country of any processed commodities upon which the tax has been paid, a credit or refund of such tax shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax.

Under the two statutory exemptions just mentioned and the Treasury Regulations promulgated thereunder, thousands of claims for refund and/or credit have been and are being presented to the Commissioner of Internal Revenue by processors, distributors, consignors, and others entitled to file such claims pursuant to such statutory provisions, and thousands of such claims have been and are being allowed by the Commissioner of Internal Revenue and are being paid or credited to such claimants. The Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1934, of which courts will take judicial notice, discloses that during the period covered by the report (p. 17), 45,278 claims for refund or credit of processing taxes refundable under Sections 15 (c) and 17 (a) of the Act were filed with the Commissioner of Internal Revenue, aggregating the amount of $27,273,763.98, of which 14,878 claims, aggregating $3,267,186.34, were allowed; 2,366 claims, aggregating $1,846,365.86, were rejected; and 28,034 claims, aggregating $22,160,211.78, were on hand June 30, 1934, in process of consideration. A similar report for the fiscal year ended June 30, 1935, will soon

be available for distribution and will disclose similar statistics on a greatly increased scale.

It is obviously not impossible for the processor, distributor or exporter, whichever may be entitled to the refund or credit under the statute, to establish how much of the tax paid upon the processed commodity and actually passed on to the purchaser or how much of the tax paid upon the processing of a commodity had actually been included in the processor's selling price of a given processed commodity. The same elements of computation and the same principles of accounting which enable a processor to prepare a claim for refund or credit of processing taxes refundable under Sections 15(c) and 17 (a) of the Act are available to him in the preparation of claims for refund and supplying the proof contemplated by Section 21(d) of the Act.

The Regulations promulgated by the Secretary of Agriculture and the Secretary of the Treasury pursuant to authority of Sections 10 (c) and 10 (d) of the Agricultural Adjustment Act, as amended, and Section 1101 of the Revenue Act of 1926, *infra*, p. 114, include conversion factor tables for each basic commodity subject to the tax and articles processed therefrom to determine the amount of tax imposed or refunds to be made with respect to integral parts of such processed commodity. The conversion factor tables applicable to hogs and pork products are incorporated in Treasury Decision 4518 (Appendix C, *infra*, pp. 103-131), promulgated January 15, 1935, which superceded Treasury Decisions 4406 and 4425, of similar import. By the use of these conversion factor tables the amount of tax paid on a given

quantity of any particular cut of the hog carcass, or of cured cuts, may readily be determined, and through the application of modern methods of accounting, it can be determined with equal facility whether the amount of the tax or any part thereof so paid on such processed products or by-products has been included in the sale price of such article or articles. In this connection a pertinent statement by Judge Yankwich of the Southern District of California in his opinion filed October 28, 1935, but not yet reported, in *Anton Rider v. Rogan*, is very persuasive, where he said:

> "One would gather from the statement of the difficulties in the amended Bill of Complaint and in the oral argument that the difficulties are insuperable. Yet the Bill states:
>
> " 'That when paid by plaintiffs said taxes become part of the cost to them of the product which they ultimately sell to their customers.'
>
> "It would seem to us that, with the high development of cost accounting at the present time, it should not be difficult to trace that initial cost. We take judicial notice of the fact that modern systems of accounting have become so accurate that manufacturers are able to trace, in industrial establishments of the most complex character, (such as automobile plants), the approximate cost of every process or every part of process which goes into the making of the whole product. Evidence of expert cost-accountants is often received in court. That such a system might be readily applied to the proof in recovery cases is also evidenced by the fact that the Treasury Department in its circular dated January 25, 1935, denominated T.D. 4518, has set up a method of

> tracing processing taxes to the various products involved in hog processing. This indicates that it is possible to trace the processing tax to the various ultimate products."

It would thus seem that the representations of appellant with respect to the impossibility of proof of the requirements of Section 21 (d) are wholly illusory, imaginary, and unconvincing.

Appellant assails Section 21 (d) because it does not appear that a trial *de novo* is granted for the litigation of the refund of processing taxes which may be rejected by the Commissioner of Internal Revenue. That failure to provide for trial *de novo* before a jury is not objectionable is well illustrated by the remedy provided for recovery of customs and import duties. Since enactment of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 138, no trial by jury has been provided in customs cases. *Schoenfelt v. Hendricks*, 152 U. S. 691; In re *Kurscheedt Manuf'g Co.*, 49 Fed. 633 (S.D.N.Y.), affirmed 54 Fed. 159 (C.C.A. 2d); *In re White*, 53 Fed. 787 (S.D.N.Y.); *Austin Baldwin & Co. v. United States*, 139 Fed. 1005 (S.D. N.Y.); *Schoellkopf, Hartford & Maclaglan v. United States*, 147 Fed. 855 (N.J.); *Vandiver v. United States*, 156 Fed. 961 (C.C.A. 3d). Under that Act and subsequent acts the importer's remedy was limited to appeal from the decision of the collector of customs to the Board of General Appraisers, then to the Federal District Courts. The District Courts had authority under the statutes to direct the taking of further evidence. *In re F. W. Myers & Co.*, 123 Fed. 952 (N.D. N.Y.). But the right to introduce further evi-

dence was limited. *United States v. China & Japan Trading Co.*, 71 Fed. 864 (C.C.A. 2d); *William F. Allen & Co. v. United States*, 127 Fed. 777 (E.D. Pa.); *J. S. Plummer & Co. v. United States*, 166 Fed. 730 (C.C.A. 2d); affirming 160 Fed. 284 (S.D. N.Y.). The remedy provided by that statute was exclusive. *United States v. Lies*, 170 U. S. 628. For a discussion of remedy prior to creation of the Court of Customs Appeals see *Stegeman v. United States*, 1 Cust. App. 208.

Since creation of the Court of Customs Appeals by the Act of August 5, 1909, c. 6, 36 Stat. 91, the importer's sole remedy is limited to appeal from the decision of the Customs Court (formerly the Board of General Appraisers, the name of which was changed by the Act of May 28, 1926, c. 411, 44 Stat. 669) to the Court of Customs Appeals. Decisions of the Court of Customs Appeals are reviewed by the Supreme Court in accordance with the provisions of the Judicial Code (Title 28, U.S.C., Secs. 301-311). Cf. *Nichols & Co. v. United* States, 249 U. S. 34; *Five Per Cent. Discount Cases*, 243 U. S. 97; *Vitelli v. United States*, 250 U. S. 355; *United States v. Aetna Explosives Co.*, 256 U. S. 402; *United States v. Rice & Co.*, 257 U. S. 536.

The adequacy of the remedy in customs cases cannot be questioned. *In Ex parte Bakelite Corp'n*, 279 U. S. 438, the Supreme Court said (pp. 457-458):

> "Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was

no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasi-judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

"The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. *In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.*" (Italics supplied.)

While an administrative remedy for the recovery of processing taxes would have been adequate, Congress has not so limited it. The remedy provided for review of the findings of the Commissioner of Internal Revenue is judicial. Cf. *Old Colony Tr. Co. v. Commissioners,* 279 U. S. 716, 723; *Tagg Bros. v. United States,* 280 U. S. 420, 443-444. Congress can unquestionably provide for an administrative determination of facts with a judicial review by the courts in such manner as may be prescribed by it. *Auffmordt v. Hedden,* 137 U. S. 310, 325, 329; *Fong Yue Ting v. United States,* 149 U. S. 698, 714-715.

There is no distinction between the constitutional rights of an importer in connection with erroneous or illegal exactions of duty and such rights of one from whom internal revenue is exacted. In both instances the attacks are made under the due process clause of the Fifth Amendment and under the jury clause of the Seventh Amendment. Both involve money taken and remedies to test the validity of the taking.

The remedy provided by Section 21 (d), although limited to a hearing before the Commissioner of Internal Revenue with review by the courts, is a judicial remedy. In *Old Colony Tr. Co. v. Commissioner,* 279 U. S. 716, 723, a case originating in the United States Board of Tax Appeals, the Supreme Court said:

> "It is not necessary that the proceeding to be judicial should be one entirely *de novo;* it is enough that, before the judgment which must be final has invoked as an exercise of judicial power, it shall have certain necessary features. * * *."

That the legal remedy may be circumscribed by certain limitations is not objectionable. In *Rees v. City of Watertown,* 19 Wall. 107, the Supreme Court says of equity (p. 121):

> "Lord Talbot says, 'There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.'"

The remedy afforded under 21 (d) is not a denial of due process. Due process of law is not necessarily judicial process. *Murray's Lessee v. Hoboken Land & Imp. Co.,* 18 How. 272; *Davidson v. New Orleans,* 96 U. S. 97; *Ex parte Wall,* 107 U. S. 265, 289; *Pittsburgh &c. Railway Co. v. Backus,* 154 U. S. 421; *Bushnell v. Leland,* 164 U. S. 684; *Buttfield v. Stranahan,* 192 U. S. 470; *Public Clearing House v. Coyne,* 194 U. S. 497; *Weimer v. Bunbury,* 30 Mich. 201; *Reetz v. Mich.,* 188 U. S. 505, 507; *Dreyer v. Illinois,* 187 U. S. 71, 83; *People v. Hasbrouck,* 11 Utah 291.

In *Tagg Bros. v. United States,* 280 U. S. 420, the Court said (pp. 443-444):

> "A proceeding under §316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered

> or decided now. *Louisville & Nashville R.R. Co. v. United States,* 245 U. S. 463, 466; Cf. *Lescio v. Campbell,* 34 F. (2d) 646, 647, and see *Prendergast v. New York Telephone Co.,* 262 U. S. 43, 50, and *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceedings. * * *."

And the same is true where individual property rights are involved. *Hawkins v. Bleakly,* 243 U. S. 210; *New York Central R.R. Co. v. White,* 243 U. S. 188; employees' compensation where the findings of administrative bodies were subject to appellate review only. *Dahlstrom Metallic Door Co. v. Industrial Board of N. Y.,* 284 U. S. 594; *Crowell v. Benson,* 285 U. S. 22.

See also: *Kentucky Railroad Tax Cases,* 115 U. S. 321; *State Railroad Tax Cases,* 92 U. S. 575; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 545; *Douglas v. Noble,* 261 U. S. 165, 167; *Title Guaranty & S. Co. v. Idaho,* 240 U. S. 136; *Hurwitz v. North,* 271 U. S. 40, 42; *Oregon R.R. & N. Co. v. Fairchild,* 224 U. S. 510, 527; *Wadley Southern Ry. Co. v. Georgia,* 235 U. S. 651, 661; *New York & Queens Gas Co. v. McCall,* 245 U. S. 345, 348; *Napa Valley Co. v. R. R. Comm.,* 251 U. S. 366, 370; *North. Pacific v. Dept. Public Works,* 268 U. S. 39, 42; *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 695; *Crane v. Hahlo,* 258 U. S. 142, 147; *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.,* 284 U. S. 151; Cf. *Pacific Live Stock Co. v. Oregon Water Bd.,* 241 U. S. 440, 451, 452.

While this Court has granted injunctions pending appeal in this and other appeals now pending before the Court, this Court also denied injunctions pending appeal in *Fisher Flouring Mills Co. v. Vierhus, supra,* and two allied cases. On November 5, 1935, the United States Circuit Court of Appeals for the Fifth Circuit, with Judges Foster, Sibley and Strum sitting, in *Rickert Rice Mills, Inc. v. Fontenot, Collector,* and seven allied cases, denied the applications of the plaintiff appellants for injunctions pending appeal and entered and filed the following *per curiam* opinion and order, not yet reported:

> "On consideration of the application for an injunction to stay collection of taxes levied under the provisions of the Agricultural Adjustment Act, as amended by the Act of August 24, 1933, the Court is of the opinion that the taxpayer has a remedy at law to recover back any taxes illegally exacted and, further, that the provisions of the Act as amended deprive the Court of jurisdiction to grant injunctive relief.
>
> "It is ordered that the application be denied."

Similar action was previously taken by the same Court on September 13, 1935, in *Jose Escalante & Co. v. Fontenot, Collector,* and two allied cases.

c. Difficulty of Proof is Not Inadequacy of Remedy

Where the statutory law sets up in terms a complete and adequate legal remedy, equity will not intervene, and certainly not to restrain tax collection, because a particular plaintiff may find that he is without the factual means to avail himself of it. The appellant confuses adequacy of remedy with difficulty of proof.

See: *Rees v. City of Watertown,* 19 Wall. 107, 124; *Thompson v. Allen County,* 115 U. S. 550, 554; *Safe-Deposit & Trust Co. v. City of Anniston,* 96 Fed. 661, 663 (C.C. N.D. Ala.); *Willis v. O'Connell,* 231 Fed. 1004, 1015 (S.D. Ala.); *Pamozzo v. Carborundum Co.,* 7 Fed. Supp. 317, 318 (W.D. N.Y.); *Newell v. Nichols,* 75 N. Y. 78, 90; *Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384, 391; *Underwood v. Wing,* 4 De Gex, M & G. 633, 43 Eng. Rep. 655.

There should be applied here the general principle applied in all cases where a refund of tax is sought—the taxpayer must show the facts upon which he predicates his claim and, if he cannot, the misfortune must be borne by him as in any other case of a failure of proof. *Burnet v. Houston,* 283 U. S. 223, 228; *Perfection Gear Co. v. United States,* 41 F. (2d) 561, 562 (C. Cls.).

In *Burnet v. Houston, supra,* the Supreme Court, reversing a judgment of the Circuit Court of Appeals for the Third Circuit which had reversed a decision of the Board of Tax Appeals sustaining disallowance of a deduction for a loss, answering the contention of the taxpayer that it was impossible to prove the loss he had sustained, in an unanimous opinion written by Mr. Justice Sutherland, stated (p. 228):

> "We cannot agree that the impossibility of establishing a specific fact, made essential by the statute as a prerequisite to the allowance of a loss, justifies a decision for the taxpayer based upon a consideration only of the remaining factors which the statute contemplates. The definite requirement of §202 (a) (1) of the act is not thus easily to be put aside. The impossibility of proving a material fact upon which

> the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforcible claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof. Compare *Underwood v. Wing*, 4 De Gex, M. & G. 632, 660; *Newell v. Nichols*, 75 N. Y. 78, 90; *Estate of Ehle*, 73 Wis. 445, 459-460; 41 N. W. 627; 2 Chamberlayne, Modern Law of Evidence, Section 970."

Since the facts alleged in the bill of complaint fail to show any special and extraordinary circumstances sufficient to bring this case within some acknowledged head of equity jurisprudence, the court below rightly concluded that it was without power to grant injunctive relief, and properly sustained appellee's motion to dissolve the preliminary injunction.

II.

APPELLANT IS WITHOUT EQUITY IN SEEKING INJUNCTIVE RELIEF

It is incumbent upon appellant to affirmatively show in its bill of complaint that it has such right, title or interest in the proceeds of the tax, collection of which it seeks to enjoin, as would result in specific injury to it if it pays the tax. That is to say, it must appear that the burden of the tax has been actually borne by him who seeks to recover or retain it. Through the absence of such a showing appellant has failed to establish that it is the real party in interest.

The reasoning of the Court as expressed in *United States v. Jefferson Electric Co.*, 291 U. S. 386, is applic-

able to the situation now under consideration. In a suit for refund it was held necessary for a taxpayer to allege and prove that he had borne the burden of the tax. Equity follows the law and requires a suitor to clearly show his right to equitable relief. The Court said (p. 400):

> "We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser. * * *"

As to the equities requiring a taxpayer to establish his right to the funds in question, the Court further said (p. 402):

> "If the taxpayer has borne the burden of the tax, *he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing.* * * *" (Italics supplied.)

The effect of the decision in the case of *United States v. Jefferson Electric Co., supra,* is such that one who pleads unconstitutionality must show that the burden of the tax has been actually borne by him and not by another. Compare *Champ Spring Co. v. United States,* 47 F. (2d) 1, 3 (C.C.A. 8th), certiorari denied, 283 U. S. 852; *Shawnopin Country Club v. Heiner,* 2 F. (2d) 393 (W. D. Pa.).

In *Burk-Waggoner Oil Ass'n v. Hopkins,* 296 Fed. 492, 499 (N. D. Tex.), affirmed 269 U. S. 110, the court said:

> "A person in order to question the constitutionality of a statute, must show that the alleged uncon-

stitutional feature injures him, and, in fact, deprives him of rights secured to him by the Constitution. * * *"

This principle was recognized and followed by this Court in *W. C. Peacock & Co. v. Pratt,* 121 Fed. 772, 778, in affirming the decree of the court below in dismissing the bill. Compare *Mountain Timber Co. v. Washington,* 243 U. S. 219, 242; *Smiley v. Kansas,* 196 U. S. 447, 457; *Walsh v. Columbus &c. Railroad Co.,* 176 U. S. 469, 479.

In view of these considerations, it is urged that appellant is without sufficient equity to entitle it to the relief prayed for.

III.

THE DECLARATORY JUDGMENT ACT IS NOT AVAILABLE FOR LITIGATING QUESTIONS ARISING UNDER THE REVENUE LAWS OF THE UNITED STATES.

In this suit appellant seeks to invoke the provisions of the Declaratory Judgment Act. Sec. 274D, *Judicial Code, infra,* p. 75. Since this suit was commenced, the Declaratory Judgment Act has been amended (Sec. 405, *Revenue Act of 1935),* and as now amended specifically prohibits the maintenance of this suit. The situation thus presented is analogous to that which arose in *Smallwood v. Gallardo, supra,* where the Supreme Court reversed the decisions of the courts below, dismissing the suits on the merits and sent the cases back with directions to dismiss for want of jurisdiction, because after the Circuit Court of Appeals had rendered its decision affirming the deci-

sion of the District Court on the merits, the Congress had enacted a statute which removed from the courts the power to grant the relief prayed for in the bill of complaint. In a concise opinion by Mr. Justice Holmes, it is stated (p. 61):

> "To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies of preventing the Island from having its revenues held up by injunctions; *a policy no less applicable to these suits than to those begun at a later day,* and a general policy of our law, Rev. Stat. Sec. 3224. So interpreted the Act as little interferes with existing rights of the petitioners as it does with those of future litigants. *There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one.* * * *." (Italics supplied.)

In its opinion in the *Smallwood* case, the Court cited with approval its previous decision in *Hallowell v. Commons,* 239 U. S. 506, which involved the jurisdiction of a District Court of the United States over a suit affecting title to an allotment of Indian lands. After the institution of the suit, the Congress, by the Act of June 25, 1910, c. 431, 36 Stat. 855, conferred upon the Secretary of the Interior the sole jurisdiction to ascertain the legal heirs of a deceased allottee. The Court held that the Act deprived the Court of jurisdiction to determine the question and that when so applied the Act was valid. On that point the Court said (p. 509):

> "There is equally little doubt as to the power of Congress to pass the act so construed. We presume

> that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened or enlarged the plaintiff's rights, as suggested in *De Luisa v. Bidwell,* 182 U. S. 1, 199, 200. See *Simmons v. Hanover,* 40 Pick. 188, 193, 194. *Hepburn v. Curts,* 7 Watts, 300. *Welch v. Wadsworth,* 30 Connecticut, 149, 154. *Atwood v. Buckingham,* 78 Connecticut, 423. The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious. See *Bird v. United States,* 187 U. S. 118, 124."

The Declaratory Judgment Act is procedural and not remedial. If there was ever any doubt as to the inapplicability of the Act for litigating questions arising under the revenue laws of the United States, any such doubt has been effectively removed by the amendment. It is now quite apparent that the Federal Courts are deprived of jurisdiction of all pending tax suits where the provisions of Section 274 D of the *Judicial Code, infra,* p. 75, have been invoked. In *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, 570, the Court said:

> "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection."

There are many decisions of similar import, and it seems to be well settled that the mere institution of a suit does not convert a mode of procedure into a vested right. This principle was well stated in the opinion in *Campbell*

v. Iron-Silver Min. Co., 83 Fed. 643, 646 (C.C.A. 8th), where the Court said:

> "It cannot be said that the mere bringing of a suit entitles the party who brings it to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure, and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when the suit was instituted, he is thereby deprived of a vested right. * * *"

Like the inhibitions of Section 3224, *Revised Statutes*, and Section 21 (a) of the *Agricultural Adjustment Act*, as amended, Section 274 D of the *Judicial Code*, as now amended, has removed any power which the Court may have had to grant declaratory relief in this type of case.

IV.

THE BILL OF COMPLAINT SHOULD BE DISMISSED

In this appeal the Court is confronted with the inhibitions of Section 3224, *Revised Statutes,* Section 21 (a) of the *Agricultural Adjustment Act,* as amended, and Section 274D of the *Declaratory Judgment Act,* as amended by Section 405 of the *Revenue Act of 1935.* Ordinarily, upon an appeal from an interlocutory order or decree, the Circuit Court of Appeals will content itself with passing upon the propriety of the interlocutory order or decree from which the appeal is taken. However, the

Supreme Court has made it quite clear that, if the Circuit Court of Appeals is clearly of the opinion that the bill of complaint is utterly devoid of equity, then the Circuit Court of Appeals may completely dispose of the case *in favor of the defendant* by directing that the plaintiff's bill be dismissed. *Smith v. Vulcan Iron Works,* 165 U. S. 518; *Ex parte National Enameling Co.,* 201 U. S. 156; *Metropolitan Co. v. Kaw Valley District,* 223 U. S. 519; *U. S. Fidelity Co. v. Bray,* 225 U. S. 205; *Meccano, Ltd. v. John Wanamaker,* 253 U. S. 136. In this last case, after reviewing previous cases, Mr. Justice McReynolds said (p. 141):

> "This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

No case decided by the Supreme Court seems to have held that a Circuit Court of Appeals has the power to enter a final decree on the merits for the plaintiff; indeed, the opinions seem to indicate that no such power exists. Thus in *Ex parte National Enameling Co., supra,* Mr. Justice Brewer (interpreting *Smith v. Vulcan Iron Works, supra,* and citing *Mast, Foos & Co. v. Stover M'f'g Co.,* 177 U. S. 485, 494-495), said (p. 163):

> "But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross appeal or to obtain the final decree in the appellate court. * * *"

The Court, in commenting on the statute allowing an appeal from an interlocutory order or decree granting or continuing an injunction, stated further (p. 162):

> "Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that 'it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication by the United States Circuit Court of Appeals as to the validity of all of the claims of the aforesaid letters patent which are the subject matter thereof.' But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings and not an advancement generally over other litigation."

In *Meccano, Ltd. v. John Wanamaker, supra*, the Court further stated (pp. 139-140):

> "We pass the question of practice whether this court under the doctrine of *Mast, Foos & Co. v. Stover*, 177 U. S. 488, may enter a decree for the plaintiff upon such an appeal as that now pending.

> *Mast, Foos & Co. v. Stover, supra,* was a case where the bill was dismissed and *no case has so far held that the plaintiff could obtain an affirmative decree.* * * * At best the rule in *Mast, Foos & Co. v. Stover, supra,* is limited to those cases in which the court can see that the whole issues can be disposed of at once without injustice to the parties." (Italics supplied.)

The situation which arose in *Smallwood v. Gallardo, supra,* as heretofore pointed out, and the ultimate disposition of that case by the Supreme Court seems to justify appellee in urging that this Court should direct a dismissal of the bill. See *Gallardo v. Santini Co.*, 275 U. S. 62.

Since Section 3224, *Revised Statutes,* and Section 21 (a) of the *Agricultural Adjustment Act,* as amended, have removed the jurisdiction of the courts to restrain the collection of *any tax*, and since Section 274D of the *Judicial Code,* as amended by Section 405 of the *Revenue Act of 1935*, and said Section 21 (a), *supra,* have removed any power which the court may have had to grant declaratory relief, the bill should be dismissed. Such action was taken by the Circuit Court of Appeals for the Tenth Circuit in *Alexander v. Mid-Continent Petroleum Corp.*, 51 F. (2d) 735.

V.

THE INJUNCTION PENDING APPEAL SHOULD BE DISSOLVED FORTHWITH

Appellant devotes the greater portion of its brief to an appeal to this Court to continue in effect the injunction granted pending appeal and urges that appellee will not be injured as a result thereof. There are various obvious reasons why such a request should not be given serious consideration. Section 129 of the *Judicial Code*, under which the jurisdiction of this Court is invoked, provides that appeals from interlocutory orders and decrees "shall take precedence in the appellate court." The purpose of such a provision becomes at once apparent. At best the remedy by injunction should never be permitted unless the right thereto is clear and distinct and unless the injury threatened is real and actual. In *Truly v. Wanzer*, 5 How. 140, the Supreme Court said (p. 142):

> "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending, and threatened so as to be averted only by the protecting preventive process of injunction."

In *Genet v. D. & H. Co.,* 122 N. Y. 505, the Court of Appeals of the State of New York said (p. 529):

> "Injury, material and actual, not fanciful or theoretical or merely possible, must be shown as the necessary or probable result of the action sought to be restrained."

In *Lutheran Church v. Maschop,* 10 N. J. Eq. 57, the Chancery Court of New Jersey, said (p. 62):

> "The court cannot grant an injunction to allay the fears and apprehensions of individuals; they must show the court that the acts against which they ask protection are not only threatened, but will in probability, be committed to their injury. * * *"

The prompt collection of the revenue is one of the most important functions of Government. Taxes are "the sole means by which sovereignties can maintain their existence." *Bank of Commerce v. Tennessee,* 161 U. S. 134, 146. Summary collection is necessary so that funds may be always available to defray public expense. As stated in *Bull v. United States,* 295 U. S. 247, 259, "taxes are the life-blood of government, and their prompt and certain availability an imperious need." To meet this need it is imperative that taxpayers be required to pay first and litigate later. As further stated in *Bull v. United States, supra* (p. 260)—

> "Thus the usual procedure for the recovery of debts is reversed in the field of taxation. *Payment precedes defense,* and the burden of proof, normally on the claimant, is shifted to the taxpayer." (Italics supplied.)

It is upon this principle that the whole scheme of Federal taxation rests, and has rested since the foundation of the Government. Beginning with *Cheatham v. United States, supra,* down through *Phillips v. Commissioner, supra* (p. 595), the Supreme Court has repeatedly held that "the right of the United States to collect its internal revenue by summary administrative proceedings has long been settled."

This same principle was earlier recognized in *Nichols v. United States*, 7 Wall. 122, when the Court said (pp. 129-130):

> "The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with despatch, and that the officers of the treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the treasury, were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the treasury estimates for any current year would be unreliable. To guard against such

> consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system*, which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment."

The forceful mandate of the Supreme Court in *Phillips v. Commissioner, supra*, will bear repetition here (p. 599):

> "It has already been shown that the right of the United States to exact *immediate payment* and to relegate the taxpayer to a suit for recovery is paramount. * * *." (Italics supplied.)

In spite of such convincing authority, appellant is urging that the Government cannot be injured by a continuance of the injunction pending a decision by the Supreme Court in *United States v. William M. Butler*, now pending before that Court. No greater injury can befall a sovereignty than to have stopped the flow of its "life-blood"—taxes. The *Butler* case is not a suit for injunction and does not involve the jurisdictional questions presented by this appeal. The decision in that case will not determine the rights of processor litigants to injunctive

relief through an invocation of the equity powers of the courts.

Available statistics of the Treasury Department disclose that approximately 37,000 processors file tax returns monthly with respect to the taxes imposed under the Agricultural Adjustment Act, as amended. Since the month of June of the present year upwards of 1,700 suits have been filed in the various District Courts for restraining the collection of processing taxes, in less than 1,100 of which restraining orders or preliminary injunctions have been granted, and from available records in the Treasury Department it is estimated that as of October 31, 1935, of the processing taxes effective under the Agricultural Adjustment Act, as amended, there was approximately $112,000,000 not being collected because collection has been enjoined by the courts. This presents a picture which shows that less than three per cent of the number of a major industry have appealed to the courts and obtained temporary advantages over the more than ninety-seven per cent of their competitors, who are paying their taxes and relying upon the refund provisions of the Agricultural Adjustment Act, as amended, for the recovery of such part of the taxes as they have borne, in the event the Act should be declared unconstitutional.

The gravity of such a situation cannot be lightly put aside. The fiscal operations of the Government function upon annual estimates and strictly budgetary requirements. To stop the steady flow of anticipated revenues is to seriously dislocate the national budgetary system.

The matters which must be considered by a court in connection with granting an injunction pending deter-

mination of an appeal were stated by Judge Learned Hand, then District Judge, in two cases in which he denied applications for such stays. In *Dryfoos v. Edwards,* 284 Fed. 596 (S.D. N.Y.), affirmed 251 U. S. 146, 264, the court denied a motion to enjoin the United States Attorney from enforcing penalties imposed under the provisions of the National Prohibition Act. It likewise denied the plaintiffs' application for a temporary injunction, saying (p. 603):

> "The Supreme Court is to hear argument upon the constitutionality of the War-Time Prohibition Act on Thursday next, and it is reasonable to suppose that an early decision will be reached. The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting v. Kansas City Stockyards* (C.C.) 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. *To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not.* In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power." (Italics supplied.)

The language quoted seems to be a complete answer to the argument advanced by appellant to the effect that the continuing of the injunction could not result in harm either to the appellee or to the United States.

In *Cunard S. S. Co. v. Mellon*, 284 Fed. 890 (S.D. N.Y.), the court dismissed a bill which sought to enjoin the Secretary of the Treasury and others from enforcing the National Prohibition Act, and denied, for the most part, plaintiff's application for an injunction pending appeal. With respect to this feature of the case, the court said (p. 898):

> "It is easy to say, if one does not take seriously the opinion behind the amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, 284 Fed. 596, filed October 10, 1919, on a similar occasion. *The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury, which no judge has the right to ignore.* The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible, if it is.
>
> "Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case." (Italics supplied.)

The Supreme Court of the United States has enunciated rules with regard to the issuance of stays pending appeal, which are entirely in accord with the views expressed by the Court in the foregoing cases. In *Virginia Ry v. United States,* 272 U. S. 658, the Court affirmed so much of a decree of a District Court as denied a temporary injunction and dismissed a bill which sought to enjoin a rate order of the Interstate Commerce Commission, and reversed so much of the decree as restrained enforcement of the order pending the determination of the main appeal. Mr. Justice Brandeis, writing the unanimous opinion of the Court, set forth the considerations which must guide a Court in considering the granting of a stay after an injunction has been denied, saying (p. 673):

> "An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances *essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction*, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. *But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and*

> *of the validity of the Commission's order.* This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure." (Italics supplied.)

In this appeal and seven allied cases, not only has Judge McCormick of the court below granted the motions of appellee to dissolve preliminary injunctions theretofore issued (R. 90), and has denied appellant's petitions for rehearing (R. 92-105), but Judge Cushman of the Western District of Washington in *Fisher Flouring Mills Co. v. Vierhus*, and six allied cases, on November 5, 1935, denied injunctions and dismissed the suits, and Judge Webster of the Eastern District of Washington in *Gibson Packing Co. v. Vierhus*, on August 31, 1935, denied an injunction, all in similar suits brought to enjoin the collection of processing taxes, and all of which are pending in this Court on appeal. This uniformity of decision creates an even stronger presumption of the correctness of the decree appealed from than existed in the *Virginia Ry* case, *supra*.

Furthermore, appellant has wholly failed to show any of the "additional facts" which the Supreme Court has said must be shown in order to justify a stay. It does not appear that any new or additional showing was presented to this Court showing why a stay should be granted, but that such application was submitted solely upon the record which the court below found insufficient to justify the continuing of the preliminary injunction.

If such injunction is continued in force, appellant is receiving in substance all that it seeks. In this, and every one of the processing tax appeals pending before this

Court in which injunctions pending appeal have been granted, the Government is in the position of having won empty victories. Despite the fact that the District Judges who have passed on these cases have held that the Court was without power to enjoin the collection of taxes, the hand of the Collector has been effectively stayed by the granting of injunctions pending appeal. In all such suits the Government is urging that the injunctions heretofore granted pending appeal, should be dissolved.

Of particular interest are the developments in *Washburn-Crosby Co. v. Nee, Collector*, in which, on October 3, 1935, the District Court for the Western District of Missouri dissolved an injunction in so far as the injunction theretofore granted referred to processing taxes which accrued subsequent to August 24, 1935. From such order, Washburn-Crosby Company appealed to the Circuit Court of Appeals for the Eighth Circuit, and immediately thereafter filed in the Supreme Court its petition for writ of certiorari. The petition for writ of certiorari presented to the Supreme Court for review, the questions of the constitutionality of the Agricultural Adjustment Act, as amended, and whether if such taxes are unconstitutional, the petitioner is entitled to injunctive relief against collection. Certiorari was denied on November 11, 1935.

For the reasons stated, it is urged that the injunction pending appeal should be dissolved forthwith.

VI.
CONCLUSION

The court below correctly sustained appellee's motion to dissolve the preliminary injunction. Because the court below is without jurisdiction to restrain or enjoin the collection of the taxes described in the bill, or to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be remanded to the District Court with instructions to dismiss the bill.

Respectfully submitted,

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NOVEMBER, 1935.

APPENDIX "A"

Judicial Code:

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (U.S.C., Title 28, Sec. 384.)

SEC. 274D. [as added by the Act of June 14, 1934, c. 512, 48 Stat. 955, and amended by Sec. 405, Revenue Act of 1935; the amendatory matter is shown in italics.]

(1) (a) In cases of actual controversy (*except with respect to Federal taxes*), the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) *The amendment made by subsection (a) of this section shall apply to any proceeding now pending in any court of the United States.*

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (U.S.C., Title 28, Sec. 400.)

Revised Statutes:

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U.S.C., Title 26, Sec. 1543.)

APPENDIX "B"

STATUTES RELATING TO REMEDIES AT LAW

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

SEC. 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

(b) [as further amended by Sec. 29 (a), Public No. 320, 74th Cong., approved August 24, 1935; the amendatory matter is shown in italics].

All provisions of law, including penalties, applicable with respect to the taxes imposed by Section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: *Provided*, That the Secretary of the Treasury is authorized to permit postponement, for a period not exceeding *one hundred and eighty* days, of the payment of *not exceeding three-fourths of the amount of the* taxes covered by any return under this title, *but postponement of all taxes covered by returns under this title for a period not exceeding one hundred and eighty days may be permitted in cases in which the Secretary of the Treasury authorizes such taxes to be paid each month on the amount of the commodity marketed during the next preceding months.*

As amended by sec. 3 of Flannagan Amendment, Public No. 476, 73d Congress, approved June 26, 1934. The amendment substituted "one hundred and eighty" for "ninety."

SEC. 21. [added by Sec. 30, Public No. 320, 74th Cong., approved August 24, 1935.]

(a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents

and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and the initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, setoff, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based

upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

(e) In connection with the establishment, by any claimant, of the facts required to be established in subsection (d) of this section, the Commissioner of Internal Revenue is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, in-

cluding the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda, relative to any matter affecting the findings to be made by the Commissioner pursuant to subsection (d) of this section, to require the attendance of the claimant or of any officer or employee of the claimant, or the attendance of any other person having knowledge in the premises, and to take, or cause to be taken, his testimony with reference to any such matter, with power to administer oaths to such person or persons. It shall be lawful for the Commissioner, or any collector designated by him, to summon witnesses on behalf of the United States or of any claimant to appear before the Commissioner, or before any person designated by him, at a time and place named in the summons, and to produce such books, papers, correspondence, memoranda, or other records as the Commissioner may deem relevant or material, and to give testimony or answer interrogatories, under oath, relating to any matter affecting the findings to be made by the Commissioner pursuant to subsection (d) of this section. The provisions of Revised Statutes 3174 and of Revised Statutes 3175 shall be applicable with respect to any summons issued pursuant to the provisions of this subsection. Any witness summoned under this subsection shall be paid, by the party on whose behalf such witness was summoned, the same fees and mileage as are paid witnesses in the courts of the United States. All information obtained by the Commissioner pursuant to this subsection shall be available to the Secretary of Agriculture upon written request therefor. Such information shall be kept confidential by all officers and employees of the Department of Agriculture, and any such officer or

employee who violates this requirement shall, upon conviction, be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or both, and shall be removed from office.

(f) No refund, credit, or abatement shall be made or allowed of the amount of any tax, under section 15, or section 17, unless, within one year after the right to such refund, credit, or abatement has accrued, a claim for such refund, credit, or abatement (conforming to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled to such refund, credit, or abatement, except that if the right to any such refund, credit, or abatement accrued prior to the date of the adoption of this amendment, then such one year period shall be computed from the date of this amendment. No interest shall be allowed or paid, or included in any judgment, with respect to any such claim for refund or credit.

(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930.

Title XI of the *Revenue Act of 1926* contains the general administrative provisions applicable to miscellaneous taxes imposed by the Congress under the *Revenue Act of 1926,* including taxes imposed under Section 600 thereof.

Sections 19 (b) and 21 (g) of the *Agricultural Adjustment Act,* as amended, make applicable the following sections of the Revised Statutes:

> SEC. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, and by Sec. 619 (b) of the Revenue Act of 1928.]
>
> Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to the Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Secs. 1670, 1676.)

SEC. 3226. [As reenacted without change by Sec. 1113 (a) of the Revenue Act of 1926, and as amended by Sec. 1103 (a) of the Revenue Act of 1932.]

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, by Sec. 619 (c) of the Revenue Act of 1928, and by Sec. 1106 (a) of the Revenue Act of 1932.]

(a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without au-

thority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1443.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1101. The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Secs. 1049, 1350, 1691.)

H. Conference Rep. No. 1757, 74th Cong., 1st Sess., pp. 31-35 [to accompany H. R. 8492]:

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

Amendments nos. 106 and 114: The House bill dealt with refunds and credits of taxes and suits relating to the recovery of taxes paid or accrued under the Agricultural Adjustment Act in two separate provisions.

The first provision (sec. 21 (a)) related to suits with respect to taxes assessed, paid, collected, or accrued prior to the adoption of the amendatory act. In such cases no suit or proceeding was to be brought or maintained, for such taxes, nor was any court to allow any recoupment, set-off, or refund of, or credit or counter claim for, any such tax. Pursuant to a final judgment or decree entered prior to the adoption of the amendatory act, such claims could be allowed. The limitations herein discussed were not to relate to overpayments of tax resulting from an error in computation, duplicate payments of tax, or to certain funds and credits allowed by the Secretary in connection with processing of low value products, deliveries of products for charitable and other similar uses, or exportations. This provision was stricken out by Senate amendment no. 106 and the Senate matter relating to the same subject matter to it was inserted by Senate amendment no. 114.

The second provision of the House bill relating to refunds and credits of taxes was contained in section 21 (d) of that bill. This applied to refunds and credits of taxes accruing on or after the adoption of the amendatory act. Here the refund or credit was to be allowed or made only if the claimant established to the satisfaction of the Commissioner of Internal Revenue that the amount of tax claimed was not passed on to the buyer or that the claimant had repaid such amount to the buyer or ultimate purchaser. The refund or credit could also be made if the claimant filed with the Commissioner the consent of the ultimate purchaser to the allowance. In the case of the tax on hogs, the claimant had to establish to the satisfaction of the Commis-

sioner that the amount claimed was not deducted from the price to the producer or he had to file with the Commissioner the producer's consent to the allowance of the refund or credit. The provision contained exceptions relating to low-value products, products for charitable uses, and exportations similar to those in section 21 (a). This provision was stricken out by amendment no. 114 and the Senate matter corresponding to it was inserted in the new matter in that amendment.

In the matter proposed to be inserted by the Senate amendment, no distinction is made between claims and suits thereon on the basis of whether the taxes accrued before or after the adoption of the amendatory act. The conference agreement adopts this principle.

The Senate amendment does not deny access to the courts on back taxes as did the House bill. The conference agreement adopts this principle.

The Senate amendment required, in the case of both back taxes and future taxes, that the claimant (in order to have his claim prevail either before the Commissioner or before the court) establish that he had not passed the amount of tax claimed on to the purchaser or back to the producer. This provision embodies the doctrine that no taxpayer ought to be unjustly enriched by a return of the tax if in fact he had not borne it. The conference agreement adopts the substance of this provision and expands and clarifies it to require the claimant to show that no person under the claimant's control or in control of the claimant passed on or back to any person the amount of tax claimed, that such amount was not included in a charge or fee for processing, and

that the price paid by the claimant or any other person was not reduced by any part of such amount.

Under the Senate amendment, the facts required to be established to obtain the relief could be established before the Commissioner or before the court in any judicial proceeding relating to the claim. Under the Senate amendment the matter is determined on the basis of evidence taken by the court. Under the conference agreement a transcript of the hearing before the Commissioner is filed with and certified to the court and that record constitutes the evidence in the proceeding. No trial de novo on the facts by the court is provided for as is provided in the Senate amendment nor can judicial proceedings be brought in the absence of the prior administrative hearing and record. This provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant.

The provisions of the conference agreement heretofore discussed do not apply to the following refunds or credits: (1) Refunds or credits with respect to the process of low value products under section 15 (a) of the act; (2) refunds or credits of tax on products for charitable use under 15 (c); (3) floor stocks tax refunds or credits under section 16; (4) refunds or credits of taxes on articles exported to foreign countries or to certain possessions under section 17 of the act; or (5) refunds or credits of tax on tobacco products for consumption beyond the jurisdiction of Federal revenue laws under section 317 of the Tariff Act of 1930.

The conference agreement strikes out a provision not contained in the House bill but inserted by the Senate amendment which required the establishment of the facts with respect to absorption of the tax by the taxpayer in Federal and State court suits for damages for the collection of the tax.

The conference agreement also inserts a provision relating to refunds and credits of floor-stocks taxes. The refunds or credits authorized under this provision are to be made to persons other than the processor or other person who paid the tax. The provision is applicable, for the most part, to wholesalers and retailers. If the processing tax is held invalid by reason of the Constitution, such persons having floor stocks on hand are entitled to the same refund or credit which they would be entitled to under Section 16 (a) and (b) of the act had the tax terminated by proclamation. The claimant must establish to the satisfaction of the Commissioner, after notice and opportunity for hearing, that the tax was included in the price to the claimant. In judicial proceedings relating to such claims the findings and record of the Commissioner constitute the evidence as in the case of suits by processors heretofore discussed.

The conference agreement also inserts a provision providing a special statute of limitations on suits for taxes based on the invalidity of the act. A claim must be filed with the Commissioner within 6 months after the tax has been finally held invalid. No suit can be begun before 1 year after the filing of such claim, unless the Commissioner renders a decision thereon within that time, or after 5 years after payment unless suit is begun within 2 years after disallowance of the part of the claim to which

the suit relates. The Commissioner is required to send notice of disallowance to the taxpayer within 90 days after disallowance.

The conference agreement also removes, in cases to which the subsection relates, the limitations of the present law on the jurisdiction of United States district courts under which they cannot entertain suits of this character against the United States, if the claim exceeds $10,000. The effect of the agreement is to authorize such courts to take jurisdiction, if otherwise within district court jurisdiction, regardless of the amount in controversy.

* * * * *

Amendment no. 108: Under the House bill, in probate, administration, bankruptcy, or other similar proceedings the claim of the United States for taxes under the Agricultural Adjustment Act and interest and penalties thereon was required to be allowed and ordered to be paid. The House bill permitted the reservation in the court's order, notwithstanding such allowance and payment, of the right to maintain a claim for credit or refund of such amount and suit thereon. In such cases the claim and suit were reserved for disposition according to the provisions of law made applicable thereto by section 19 of the Agricultural Adjustment Act. This amendment broadens the provision to include all applicable provisions of law including those discussed in connection with amendments nos. 106 and 114. The House recedes.

* * * * *

Amendment no. 111: The House bill legalized and ratified taxes imposed under the Agricultural Adjustment Act prior to the adoption of the bill.

This amendment includes tax penalties and interest within the provision. The House recedes.

Amendment no. 112: The House bill, in providing for legalization and ratification of taxes imposed under the act, states that they shall be validated as fully as if each such tax had been specifically fixed by Congress on May 12, 1933 (the date of the enactment of the original Agricultural Adjustment Act). This amendment strikes out the specific date, May 12, 1933, and makes the provision read "by prior act." The effect of the amendment is to make this legislation and ratification effective as if there had been in existence, immediately prior to the occurrence of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes.

Amendment no. 113: This amendment legalizes and ratifies all rental and benefit payments, all agreements with producers, and the adoption of other voluntary methods, prior to the date of the amendment. The legalization and ratification is made effective as if there had been in existence, immediately prior to the taking of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes with an amendment including within the types of action legalized and ratified the initiation, if formally approved by the Secretary of Agriculture prior to the date of the adoption of the amendment, of adjustment programs under section 8 (1) of the Agricultural Adjustment Act.

Amendment no. 115: This amendment authorizes the Commissioner of Internal Revenue or his agents designated for the purpose, in connection with the establishment, by any claimant, of the

facts required to be established by Senate amendment no. 114 as a prerequisite to obtaining any recovery, recoupment, set-off, refund, or credit, to examine books, papers, records, or memoranda bearing upon such facts, to require the attendance of the claimant or any officer or employee of the claimant or any other person having knowledge in the premises, and to take their testimony, with the power to administer oaths. The information thus obtained by the Commissioner is to be made available to the Secretary of Agriculture upon written request therefor; but must be kept confidential by the Department of Agriculture. Penalty is provided for violation of this requirement by any officer or employee of the Department. There was no comparable provision in the House bill. The conference agreement retains the substance of the Senate amendment with an additional provision specifically authorizing the Commissioner or any collector designated by him to summon witnesses on behalf of the United States or any claimant, to appear and produce books, papers, correspondence, memoranda, or other records deemed relevant or material by the Commissioner, and give testimony or answer interrogatories. The provisions of Revised Statutes 4174 and 4175, relating to service of summons and proceedings upon failure to obey a summons, are made applicable to any summons issued under the subsection, and witnesses summoned are to be paid the same fees and mileage as are paid witnesses in the courts of the United States.

Amendment no. 117: This amendment is designed to make the statutory period for filing claims for refund or credit of the amount of any tax under section 15 or 17 of the Agricultural Adjust-

ment Act (relating to exceptions, compensating taxes, and exportations) applicable to an abatement of tax under such sections. The House recedes.

Amendment no. 118: Under the House bill the provisions of the subsection fixing the statutory period for refunds or credits applied to refunds or credits under section 16 of the Agricultural Adjustment Act (relating to floor stocks). In view of the action on amendment no. 99 which provides the statutory period for refunds or credits under section 16, the House recedes.

Amendment no. 119: The House bill extended the provisions of section 3226 of the Revised Statutes, as amended (which requires the filing of claims for refund or credit with the Commissioner of Internal Revenue and fixes a period of limitation on suits), to apply to any suit to recover taxes which accrued under the Agricultural Adjustment Act on or after the date of adoption of the amendment, and to any suit for recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax. The Senate amendment extends the application of section 3226 to include suits for any penalty or interest, as well as tax, which accrued before, on, or after the date of the adoption of the amendment and to refunds or credits authorized in the case of certain exempted transactions and in the case of certain exportations and floor stocks. The House recedes with clarifying amendments. (Italics supplied.)

Cong. Rec., Vol. 79, No. 167, pp. 13475-13476:

[Mr. Jones, Chairman of the House Committee on Agriculture, submitted the Conference Report to the House of Representatives, which was agreed to by

the House on August 13, 1935. In presenting the report to the House, Mr. Jones made the following statement in explanation of the action of the conferees:]

Mr. Jones: Mr. Speaker, this bill is largely in the form in which the House passed it. It is true there are 163 amendments. A great many of these amendments are largely changes in section numbers and formal changes that do not amount to a great deal. They are all fully explained in the conference report.

In its essential parts the bill is as it passed the House. One exception is the provision for suits. The bill as it passed the House placed a ban on all suits on the part of processors for the recovery of taxes heretofore collected in the event the taxes should be held illegal. The Senate adopted an amendment which permitted taxes to be recovered in suits by any processor in the event that taxes should be held illegal. A compromise was adopted. The Senate amendment made no provision whatever for recovery on the part of wholesalers or retailers on stocks on hand which had absorbed the taxes. A compromise was reached which provides that the wholesaler and retailers may recover on stocks which they have on hand unsold at the time the tax becomes ineffective. It then permits the processors to file claims for refund with the Commissioner of Internal Revenue who conducts hearings and makes findings of fact. In order to recover the processors must show that they neither passed the tax on in the price of the product which they sold nor charged it back to the farmer in the form of a reduced price which they paid him for his article. They may then file suit for recovery of the taxes, but the commis-

sioners' hearings and findings become the record in the case. This, in a general way, is the explanation of the suit provision.

Cong. Rec., Vol. 79, No. 169, pp. 13700, 13701, 13702:

[Senator Smith, Chairman of the Senate Committee on Agriculture and Forestry, submitted the Conference Report to the Senate, which was agreed to by the Senate on August 15, 1935. In the discussion in the Senate prior to the final vote of agreement accepting the Conference Report, the following pertinent statements were made by various members of the Senate:]

Mr. Borah: Mr. President, before the report is acted upon, I desire to see if I understand it.

Referring to amendment no. 114, the House has receded from its disagreement to the Senate amendment, and has agreed to it with an amendment, as follows:

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax) unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the

article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court—

And so forth.

The question with me is, What is the modus operandi by which the party desiring to recover finally reaches court in case he desires to go to court?

Mr. Smith: As it was discussed by the legal representatives, both of the Department and those who claim that distinction on the committee, wherever one had a claim, according to the custom under the law as it now prevails in reference to a rebate or refund of a tax, he goes before the internal-revenue collector and states his case. After the matter was discussed at some length, the members of the committee decided not to restrict the plaintiff to matters upon which the Commissioner either allowed or rejected the claims, but the whole record as it appeared before him should be the basis of the claimant going into court. He can reject any finding of the Commissioner, unless it is in accordance with his claim, and go before a court of competent jurisdiction, and, upon the record as it is set up, he can prosecute his case.

* * * * *

Mr. King: Mr. President, I join in the request of the Senator from Idaho. May I call the attention of the Senator from Idaho to this language in the section to which the Senator referred, namely:

> Neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on—

This is the point—

> any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing—

And so forth. Which would mean that if the Government had, as he believed, illegally collected a thousand dollars, and he demonstrated that he had not passed on any part of it except $1, he then would be denied relief under the interpretation of the language.

* * * * *

Mr. George: Mr. President, I desire to be heard on that point.

I do not wish to have an incorrect interpretation placed upon the bill. The interpretation placed upon it by the Senator from Utah is not correct. At first blush, it seemed to me to be the proper interpretation; and when we were considering this matter originally in the Senate that was my conclusion. A careful reading of the language, however, will disclose that the interpretation is not correct.

If the Senator will bear with me, I will read:

No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax—

The "amount of any tax" refers back to that original subject, and it is not subject to the interpretation which seems to be about to be accepted here. *I wish the RECORD to show what is the correct interpretation of the language as I construe it.*

* * * * *

Mr. President, the amendment is not all that I desire, but I believe it preserves at least some legal rights of the claimant to a refund or to a credit for a tax illegally collected or a tax improperly collected. In my judgment, "the amount of any tax" refers back to the original language at the beginning of this particular section.

I desire to call attention to the fact that this is not a provision for authority for the claimant to sue. It is no grant of the right to sue. It is nothing but a limitation upon that right. In my judgment, it would not be strictly or technically construed by any court. It would be given a fair and a liberal interpretation. Therefore, if the claimant should make out a just case and secure a judgment of $500 for taxes illegally collected, I cannot believe the court would then deny a judgment simply because the claimant had passed on a small amount of the $500 to the ultimate consumer, because I think it would be construed as it properly is—merely a limitation upon a right otherwise existing and merely a condition.

I myself wish very much that the broad, unrestricted right of the claimant to come into court

might have been given without so many hedging phrases and so much language; but, looking to what the court would ultimately do with this section, I have no doubt that a substantial right is given. It is true that the claim must first be made before the Commissioner of Internal Revenue, but that is true now in many instances. That was true under the revenue act which permitted a claim for refund for unsold automobile parts, and it is also true even in the administration of veterans' legislation. Before any suit may be commenced or maintained upon a policy of insurance, the veteran must make out his case and obtain an affirmative approval or disapproval of his alleged cause of action by the Administrator of Veterans' Affairs.

Properly construed, the real purpose, whether it be always properly administered, is to give the Government opportunity to settle a just case when all of the facts have been made to appear. Although the Commissioner of Internal Revenue is a political officer, of course, and generally is disposed to construe an act favorably to the Government, nevertheless, in many instances the facts are found properly, correctly, and justly, and the Government is enabled to make refunds without the necessity of further court action upon the record actually made up. (Italics supplied.)

APPENDIX "C"

(T. D. 4518)

Processing and other taxes with respect to hogs under the Agricultural Adjustment Act.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides in part:

> When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated August 17, 1933, provides:

> I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that benefit payments are to be made with respect to hogs, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

> The Secretary of Agriculture is authorized, with the approval of the President, to make such regula-

tions with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. Section 9(d)7, Agricultural Adjustment Act, as amended, provides:

> In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for distribution or use, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

PAR. E. The regulations, with respect to the processing tax on hogs, made by the Secretary of Agriculture, with the approval of the President, dated October 18, 1933, as revised, and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated October 29, 1934, provide:

> (1) I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for hogs shall begin November 5, 1933.
>
> I do hereby find that the rate of tax as of November 5, 1933, which equals the difference between the current average farm price for hogs and the

fair exchange value of hogs, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of hogs, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of hogs, or products thereof, or in the depression of the farm price of hogs. I do accordingly hereby determine: As of November 5, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be fifty (50) cents per hundred (100) weight, live weight; as of December 1, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar per hundred (100) weight, live weight; as of February 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar fifty (50) cents per hundred (100) weight, live weight; as of March 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be two (2) dollars twenty-five (25) cents per hundred (100) weight, live weight, which said rate, as of the effective date thereof, will prevent the accumulation of surplus stocks and depression of the farm price of hogs.

I. Definitions.

(2) The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The term "first domestic processing" means the slaughter of hogs for market; except that (*a*) in the case of a producer or feeder who shall distribute the carcass or any edible hog product directly to a consumer, the term

"first domestic processing" means the preparation of the carcass or any edible hog product for sale, transfer, or exchange or for use by the consumer, and only the edible product or products so sold, transferred, exchanged or distributed by or for the producer or feeder shall be deemed to have been processed, and (*b*) in the case of a producer or feeder who shall sell, transfer, or exchange any carcass or edible hog product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character, the term "first domestic processing" means the initial act of such person, restaurant, hotel, club, hospital, institution, or establishment which involves the preparation of the carcass or any edible hog product for further distribution or use.

Slaughtering.—Slaughtering is the actual killing of hogs. Hogs condemned by an authorized Federal, State, county, or municipal inspector as being totally unfit for human food shall not be considered hogs slaughtered for market within the mean of these regulations.

Live weight.—Live weight is the weight of the live animal at the time of slaughter. However, the actual weight at the time of purchase may be used as the live weight in the meaning of these regulations, provided the hogs are slaughtered within three (3) days after the date of such weighing. When any primal part or edible portion of the vis-

cera has been condemned as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food, the equivalent live weight of such condemned part shall not be included in the live weight subject to the processing tax; provided, however, that the processor of such condemned part shall show by his affidavit the actual weight thereof; the actual weight so shown shall be restored to a live-weight basis by using the conversion factor prescribed for such part in the tables of conversion factors herein, except that the conversion factor for the edible portion of condemned viscera sets shall be 50 per cent.

Carcass.—Carcass is the animal body after the blood, hair, toes, and viscera have been removed.

Wiltshire.—A Wiltshire is half of a hog carcass with head, feet, and part of jowl removed, consisting of the ham, side, and shoulder in one piece.

Cumberland.—A Cumberland is similar to a Wiltshire except that the ham is removed.

Cuts.—Cuts are the various parts into which the hog carcass is divided in the operation of converting the carcass into products which go into commercial trade.

Ham.—A ham is that part of the hog carcass which consists of the hind leg extending from the foot to the backbone (not inclusive). It may include part or all of the hock and part or all of the pelvic bone.

Regular ham.—A regular ham is a ham, either long-cut or short-cut, from which skin has not been

removed. This classification includes such styles as American, English, Italian, and all other varieties of unskinned hams.

Skinned ham.—A skinned ham is a ham, either long-cut or short-cut, of any description from which all or part of the skin has been removed.

Boneless ham.—A boneless ham is a ham of any description from which all of the bone has been removed.

Rough shoulder.—A rough shoulder is that part of the hog carcass extending from near the third rib to but not including the jowl, with the foot removed.

Regular shoulder.—A regular shoulder is a rough shoulder with neck and rib bones removed. This classification includes such styles as English, New York, New Orleans, and all other varieties of unskinned shoulders.

Skinned shoulder.—A skinned shoulder is a regular shoulder from which part or all of the skin has been removed.

Picnic.—A picnic is a cut comprising about the lower two-thirds of the shoulder. This classification includes regular shank, short shank, shankless, and skinned or unskinned picnics; and also shanks (sometimes called hocks) which may have been previously separated.

Boneless picnic.—A boneless picnic is a picnic of any description from which all of the bone has been removed.

Shoulder butt.—A shoulder butt is the top portion of the shoulder which is removed from the shoulder in making a picnic.

Butt.—The butt is the portion of the shoulder butt after removal of plate. This classification includes such styles as Boston, Milwaukee, Buffalo, and all other types of butts except boneless butts.

Boneless butt.—A boneless butt is a Boston or other style butt with bone removed.

Plate.—A plate is the fat portion of the shoulder butt.

Rough short ribs.—Rough short ribs are the middle portion of the hog carcass after removal of the hams and shoulders.

Short ribs.—Short ribs are the rough short ribs with the backbone and tenderloin removed.

Extra short ribs.—Extra short ribs are the rough short ribs with the loin removed.

Short clears.—Short clears are the rough short ribs with the backbone, spareribs, and tenderloin removed.

Extra short clears.—Extra short clears are the rough short ribs with the loin and spareribs removed.

Rib back.—The rib back is the upper half of the rough side with the tenderloin removed.

Pork loin.—Pork loin is that portion of the side of the carcass from which the belly and fat back have been removed; it usually contains the backbone, back ribs, and tenderloin and has but a small amount of fat on the outside. This classification, however, includes bladeless loin, tenderloin, and boneless loin, either domestic trim or Canadian style.

Fat back.—Fat back is that portion of the side which remains after removal of the pork loin and

belly. This classification includes skinned, unskinned, and long-cut and short-cut fat backs.

Spareribs.—Spareribs are the meaty ribs taken from the side in half or whole sheets.

Belly (when cured and smoked, commonly known as bacon)—

Dry salt trim (commonly known as "belly D. S. trim"): The roughly trimmed portion of the rough side remaining after removal of loin and fat backs and including or excluding spareribs, whether or not put down in dry salt.

Pickle trim (commonly known as "belly S. P. trim"): Same as above except trimmed reasonably square. This classification includes English style bellies and all belly cuts not otherwise described, including fancy trimmed bellies and briskets.

Briskets.—Briskets are pieces removed from the shoulder ends of bellies.

Jowl.—A jowl is the cheek and part of the neck. This classification includes jowl butts and bacon squares.

Head.—The head is the hog skull and jawbones with attached organs and fleshy covering, except the jowls.

Trimmings.—The trimmings are the boneless meat of all degrees of lean and fat derived from any portion of the hog carcass which has lost its identity as a major cut.

Foot.—The foot is that part of the front or hind leg from approximately the knee joint downward.

Neck bones.—Neck bones are bones of the neck with adhering flesh after removal from the rough shoulder.

Cheek meat and temple meat.—Cheek meat and temple meat consist of the fleshy covering of the upper jawbone and forepart of skull.

Lard.—Lard is edible hog fat after rendering. This includes refined and unrefined lard, neutral lard, and leaf lard. Unrendered fats should be converted to a lard yield basis.

Viscera.—Viscera are the intestines, with their contents, and vital organs of the body cavities, with their attached fats.

Edible offal.—Edible offal are the various edible products obtained from hog viscera and hog heads; also the hog feet and tails.

Inedible offal.—Inedible offal are the various inedible products obtained in the slaughter of hogs, consisting largely of blood, hair, bristles, parts of the viscera and their contents, and skin.

Tankage.—Tankage is the residue from rendering or cooking operations in the production of lard or grease from hog products.

Fresh, chilled, or green meat.—Fresh, chilled, or green meat is meat which has not been subjected to any preservative treatment, such as cooking, drying, freezing, or the use of curing agents.

Frozen meat.—Frozen meat is fresh meat held below the freezing temperature of such meat.

In cure.—In cure (usually called by the trade "in process of cure") is meat under treatment of curing

or preservative agents. This includes all meat packed as barreled pork.

Cured meat.—Cured meat is meat which has gone through a complete curing or preservative process.

Put down or pack.—To place meat in cure.

Smoked meat.—Smoked meat is meat exposed to a smoking treatment.

Cooked meat.—Cooked meat is meat exposed to a cooking treatment.

Canned meat.—Canned meat is meat cooked and packed in hermetically sealed metal or glass containers.

Dried meat.—Dried meat is meat preserved by a drying treatment.

General.—Barreled pork is to be classified according to the cut from which derived, and reported on basis of put-down green weight.

Sausage.—Sausage is chopped or ground meat composed wholly or in chief value from pork and seasoned. It may be in bulk, or stuffed in animal casings, or packed in other containers.

Fresh sausage.—Fresh sausage is sausage made of fresh or frozen meat and not subjected to a treatment of smoking, cooking, or drying.

Smoked and/or cooked sausage.—Smoked and/or cooked sausage is sausage made from fresh, frozen, or cured meat and further treated by smoking or cooking, or both, but not treated by drying.

Dried sausage.—Dried sausage is sausage made from fresh, frozen or cured meat and further treated by drying. It may be further treated by

smoking or cooking, or both. It includes all cervelats, salamis, and mettwursts of Italian, German, Polish, or other styles.

Luncheon meats.—Luncheon meats are mixtures prepared for eating without further cooking and include such articles as pork loaf, sandwich meat, head cheese, souse, and similar combinations. This classification does not include canned loins or canned tongue; whole or part pieces of canned ham, which are derived from hams; canned deviled ham, canned spiced ham, and canned spiced luncheon meats which are derived from trimmings. They are to be considered as cooked products of the cuts from which derived and are subject to the conversion factor prescribed therefor.

Feeder.—The term "feeder" means any individual or individuals, actively and regularly engaged in the fattening of hogs for market, or in farming operations, a part of which is the fattening of hogs, except retailers, wholesalers, or distributors of meat, butchers, abattoirs, slaughterhouses, packers, factors, or commission merchants.

Producer.—The term "producer" means the individual or individuals who own the hog at the time of farrowing.

Preparation of the carcass or any edible hog product.—The term "preparation of the carcass or any edible hog product" means the preparation, conversion, and/or delivery of any hog carcass or any edible hog product, including, but not limited to, any operation connected with receiving, handling, storing, wrapping, cutting, trimming, and/or rendering any hog carcass or any edible hog product.

Primal parts.—The term "primal parts" means the commercially so-designated sections, cuts, or parts of the dressed carcass (including, but not limited to, such parts as shoulders, hams, bellies, tongues, livers, and heads) before they have been cut, shredded, or otherwise subdivided as a preliminary to use in the manufacture of meat products.

Green weight.—The term "green weight" means the weight of any hog product in its fresh state, after chilling and before any manufacturing operation (including, but not limited to, such operations as freezing, curing, cooking, or drying) has been performed.

II. Conversion Factors.

(3) I do hereby establish the following conversion factors for articles processed from hogs, to determine the amount of tax imposed or refunds to be made with respect thereto:

A. The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following articles processed wholly or in chief value from hogs:

Article.	Conversion factor. Fresh, frozen, in cure, or barreled pork.	Cured. Dry salt.	Cured. Pickle.	Smoked.	Cooked, dried, or canned.
Carcass:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent
Head and leaf included	132	132	125	140	178
Head included, leaf removed	134	134	127	142	181
Head removed, leaf included	138	138	131	146	186
Head and leaf removed	139	139	132	147	188
Wiltshire side	145	145	138	154	196
Cumberland side	132	132	125	140	178
Regular ham	194	194	184	206	242
Skinned ham	219	219	205	229	292
Boneless ham	252	252	239	267	340

Article.	Conversion factor. Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent
Rough shoulder	85	85	81	90	115
Regular shoulder	89	89	86	94	120
Skinned shoulder	94	94	89	100	127
Picnic	76	76	72	81	103
Boneless picnic	99	99	95	105	129
Shoulder butt and butt	123	123	116	130	166
Boneless butt	179	179	170	190	242
Plate	80	80	76	85	108
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	135	135	129	143	182
Pork loin	216	216	205	229	292
Fat back	87	87	83	92	117
Spareribs	66	66	63	70	89
Belly D. S. trim	124	124	118	131	167
Belly S. P. trim, briskets	180	180	171	191	243
Jowl	80	80	76	85	108
Head	60	60	58	63	81
Trimmings	80	80	76	85	108
Neck bones	19	19	18	20	26
Feet	19	19	18	20	26
Tails	44	44	42	47	59
Livers, hearts, and kidneys	44	44	42	47	59
Snouts, ears, lips, and miscellaneous edible offal	22	22	21	23	30
Cheek meat	88	88	84	94	118
Brains	44	44	42	47	59
Tongues	166	166	157	176	224
Lard	110	.....	.....	.....	.....
Pork sausage	80	80	76	85	112
Dried sausage (including cervelats and salamis)	60	60	57	63.75	84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	76	76	72.20	81.75	106.40
Inedible offal	0	0	0	0	0

B. In the event that any taxpayer or person entitled to a refund establishes that any or all of the types of sausages, processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the listed conversion factor, then the conversion factor, for each pound of pork which said sausages are established to contain, shall be the following percentage of the per pound processing tax on hogs:

(a) If fresh meat, 80 per cent.

(b) If cured, dry salt meat, 80 per cent.

(c) If cured, sweet pickle meat, 76 per cent.

(d) If smoked meat, 85 per cent.

(e) If cooked, dried or canned meat, 112 per cent.

C. The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following hog products sold directly to the consumer by the producer or feeder of the hogs:

Article.	Conversion factor. Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt-cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried, or canned pork	178

D. When any edible product for which no specific conversion factor is prescribed in these regulations (1) is wholly or partly of pork and is subject to

the payment of a compensating tax or with respect to which a refund of tax is allowable upon exportation or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (2) is wholly or in chief value of pork and is subject to the payment of a floor stocks tax or with respect to which a credit or refund of tax upon floor stocks is allowable, such tax shall be paid or such credit or refund shall be allowed with respect to the said product on the amount of the pork content thereof, according to the conversion factor prescribed for each cut from which the pork contained in such product was derived.

III. Exemptions.

(4) In my judgment, the imposition of the processing tax upon hogs processed by the producer thereof who sells directly to or exchanges directly with the consumer not more than three hundred (300) pounds of the products derived therefrom, during any marketing year, is unnecessary to effectuate the declared policy of the Act. Accordingly, I do hereby exempt from the processing tax, hogs processed by the producer thereof who sells directly to or exchanges directly with the consumer not more than three hundred (300) pounds of the products derived therefrom, during any marketing year: *Provided, however,* That if the producer processes hogs produced by him and sells directly to or exchanges directly with the consumer during any marketing year, products derived therefrom in excess of three hundred (300) pounds, but does not sell or exchange in excess of one thousand (1,000) pounds, he shall be entitled to the foregoing exemption, but shall pay the processing tax on the excess

above three hundred (300) pounds, restored to a live-weight basis by use of the conversion factors prescribed as provided herein in paragraphs C and D under the heading "II. Conversion factors." *Provided further,* That if the producer processes hogs produced by him and sells or exchanges more than one thousand (1,000) pounds of the products derived therefrom, during any marketing year, he shall not be entitled to the foregoing exemption.

When hogs are owned on a share basis, the foregoing exemption shall be apportioned between the joint owners thereof on the basis of their respective shares.

When a producer has processed hogs produced by him and has sold, during the marketing year, products derived therefrom in excess of one thousand (1,000) pounds, and has failed to pay the processing tax on hogs for the month in which the said hogs were processed, due to a reliance on the foregoing exemption, then he shall be liable for the processing tax upon all of the hogs, live weight, theretofore processed, with respect to which no processing tax has been paid, as for the month in which the hog products sold exceeded one thousand (1,000) pounds, at the rate of tax in effect on the date of processing. To restore the hog products sold to a live-weight basis, the producer shall use the conversion factors prescribed as provided herein in paragraphs C and D under the heading "II. Conversion factors."

When the hogs are processed by the producer, it will not be necessary for the producer to furnish an affidavit, or witnessed statement, upon the processing of hogs for sale or exchange by him, of the hog products sold or exchanged, to the extent of the

foregoing exemption and tolerance allowance, and/or upon the processing of hogs by or for the producer thereof for consumption by his own family, employees, or household, of the hogs slaughtered for that purpose, provided the producer keeps a written record showing the date on which the hogs were slaughtered; the number of hogs slaughtered; the live weight of the hogs slaughtered (or where not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); the hog products sold, the weight thereof, the price paid therefor, the date of the sale, and (where practicable) the name and address of the person to whom sold; the hog products consumed by his own family, employees, or household and the actual or estimated weight thereof; and the live weight of hogs processed by or for the producer thereof, his own family, employees, or household, together with the name and address of the processor thereof.

The provisions of these regulations shall take effect as of November 1, 1934.

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 15(e) of the Agricultural Adjustment Act, as amended, provides in part:

During any period for which a processing tax is in effect with respect to any commodity there shall

be levied, assessed, collected, and paid upon any article processed or manufactured wholly or partly from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, whether imported as merchandise, or as a container of merchandise, or otherwise, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing of such commodity at the time of importation; * * *

PAR. H. Section 10(d), Agricultural Adjustment Act, provides:

> The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. I. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

> The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations are hereby prescribed:

> ARTICLE 1. *General.—(a)* A processing tax on the first domestic processing of hogs became effective at the earliest moment of November 5, 1933. A compensating tax became effective with respect to all articles processed or manufactured *wholly or in chief value* from hogs, and imported on or after

November 5, 1933. A compensating tax became effective with respect to all articles processed or manufactured *wholly or partly* from hogs, and imported after 11.23 a.m., eastern standard time, May 9, 1934. See section 15(e) of the Agricultural Adjustment Act as amended by the Act approved May 9, 1934 (48 Stat., 670), quoted in paragraph G, above.

The present rate of processing tax is given in article 2 of these regulations. The present compensating tax on each pound of the various hog products is given in article 4 of these regulations.

(b) For regulations relating to the processing tax and compensating tax consult Regulations 81 and for regulations relating to exportation under section 17 of the Act consult Regulations 83, September, 1934, edition, which are general regulations under the Agricultural Adjustment Act, as amended. Regulations 81 and Regulations 83, September, 1934, edition, are supplemented by the regulations contained in this Treasury decision.

(c) With respect to hogs, and articles processed therefrom, the date, November 5, 1933, when the processing tax with respect to hogs first took effect, is the "effective date" as defined and used in Regulations 81 and Regulations 83, September, 1934, edition. See paragraph E(1), above, for the dates subsequent to November 5, 1933, when increased rates of processing tax became effective.

(d) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph E(2), above, are hereby made a part of these regulations.

ART. 2. *Processing tax.*—(A) The rate of processing tax on the first domestic processing of hogs, in force since the earliest moment of March 1, 1934, is $2.25 per hundredweight, live weight.

(B) Within the meaning of the term "first domestic processing of hogs" as defined in paragraph E(2) there are three classes of persons who may be liable for the processing tax on hogs, namely:

Class 1. A person, other than a producer or a feeder, who slaughters hogs for market;

Class 2. A person who receives, by sale, transfer, or exchange, from a producer or feeder the carcass of a hog, or any edible hog product, and who prepares such carcass or product for further distribution or use. As so used, the term "person" means any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such product for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), and includes any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character; and

Class 3. A producer or feeder with respect to a hog carcass or other edible hog product sold directly to, or exchanged directly with, consumers.

The form prescribed for return of processing tax by a processor in class 1, is P. T. Form 4A; in class 2, P. T. Form 4B; and in class 3, P. T. Form 4X. Returns on these forms must be filed in duplicate with the collector for the district in which the principal place of business of the processor is located *on or before* the last day of the month following the month in which the processing is done. The

amount of tax shown to be due on each such return must be paid at the time when the return is filed, or if the time for payment be postponed, then at the time or times designated for payment in such postponement.

(C) *Processors in class 1.*—Each processor in class 1 (other than a producer or feeder) who slaughters hogs for market shall file for each calendar month a return on P. T. Form 4A in accordance with the instructions printed on the form and in accordance with these regulations. Such processor shall attach to and make a part of his return when filed, a statement, in duplicate, with respect to the parts of hogs condemned during the month, showing (1) the name of each such part, (2) the actual weight thereof, (3) the conversion factor applicable for determination of the equivalent live weight, and (4) the equivalent live weight of such part. For applicable conversion factors see paragraph E(3), above. Credit may be taken only for a primal part or edible portion of the viscera which has been condemned, as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food. See definition of live weight in paragraph E(2). If the viscera set of a hog is condemned and the weight of the edible portions thereof can not be ascertained by actual weighing, 2½ per cent of the weight of the live hog from which such viscera set was derived may be considered as the equivalent live weight of such edible portions.

Each processor in class 1 shall keep a record showing for each calendar month, (1) the number and live weight of hogs on hand at the beginning of the

month, (2) the number and live weight of hogs received during the month, (3) the number and live weight of hogs shipped or delivered during the month, (4) the number and live weight of hogs destroyed or otherwise disposed of during the month, (5) the number and live weight of hogs on hand at the end of the month, and (6) the number and live weight of hogs put in process during the month. The live weight must be ascertained by actual weighing on accurate scales and not by estimation. Such person shall also keep a record of the products of such processing, and preserve accurate accounts of all transactions involved in any way in any claim for refund, for abatement, or for credit, and of processing exempt from tax.

(D) *Processors in class 2.*—Each processor in class 2, with respect to hog carcasses or other edible hog products received from a producer or feeder, and prepared for further distribution or use, shall report each such product so prepared in monthly return on P. T. Form 4B. Each such person who is also a processor of hogs in class 1 shall execute P. T. Form 4A and P. T. Form 4B in accordance with the instructions printed thereon and in accordance with these regulations. The total tax shown to be due on P. T. Form 4B shall be entered on line 11 of P. T. Form 4A and included with the total tax shown by that return to be due. The original and duplicate copies of P. T. Form 4B shall be securely attached to the respective original and duplicate copies of P. T. Form 4A and made a part of such return.

Each processor in class 2 shall keep a record showing for each calendar month (1) the date of receipt of the carcasses or other edible hog products from a

producer or feeder, (2) the name and address of the producer or feeder from whom such products were received, (3) an exact description of each such product conforming with the description thereof in paragraph E(3), above, and (4 the actual weight of each such product.

(E) *Processors in class 3.*—Each producer-processor or feeder-processor of hogs in class 3 who sells directly to, or exchanges directly with, consumers, carcasses or other edible hog products derived from hogs processed by him, or who shall sell, transfer, or exchange any such product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market, or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar character, shall file for the month of November, 1934, and for each subsequent calendar month a return of such transactions on P. T. Form 4X in accordance with instructions printed thereon. Only such products sold directly to, or exchanged directly with, consumers by the producer or feeder shall be deemed to have been processed by the producer or feeder. See subdivision (F), below, and paragraph E(4), above, relative to exemption in the case of a producer-processor with respect to sales directly to, or exchanges directly with, consumers.

(F) *Exemption.—(a)* A producer who processes hogs *produced* by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers not more than 300 pounds of the products derived therefrom, is exempt from processing tax on the live-weight equivalent thereof, computed in accordance with the conversion factors prescribed, as set forth below. This exemption is applicable only

with respect to hogs owned by the producer from the time they were farrowed. *A feeder-processor is not entitled to, and may not claim, any exemption* with respect to sales, transfers, or exchanges of hog products made by him.

(b) A producer who processes hogs produced by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers, products derived therefrom in excess of 300 pounds but not in excess of 1,000 pounds shall be entitled to the exemption on 300 pounds of such products but shall pay the processing tax on the excess above 300 pounds. The processing tax on such excess shall be computed on a live-weight basis in accordance with the conversion factors hereinafter set forth.

(c) When two or more individuals produce a hog, the exemption as to 300 pounds shall be apportioned between the joint producers thereof on the basis of their respective shares.

(d) A producer who processes hogs produced by him and who sells directly to, or exchanges directly with, consumers during any marketing year more than 1,000 pounds of the products derived therefrom shall not be entitled to the above exemption of 300 pounds. When such total sales or exchanges first exceed 1,000 pounds, the producer becomes liable for the processing tax on the live-weight equivalent of all products derived from hogs processed, which were sold or exchanged by him since the beginning of the marketing year. The return of such producer-processor for the month in which such total sales or exchanges during the marketing year first exceed 1,000 pounds shall include the 300 pounds which would have been exempt except for such excess.

(e) For the purpose of determining the amount of tax to be paid, the producer shall use the conversion factors set forth below to restore to a live-weight basis the hog products sold or exchanged:

Article.	Conversion factor. Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried or canned pork	178

(f) Each producer or feeder shall keep a written record showing: (1) the date on which the hogs were slaughtered; (2) the number of hogs slaughtered; (3) the live weight of the hogs slaughtered (or if that is not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); (4) the hog products sold or exchanged; (5) the weight thereof; (6) the date of the sale or exchange; (7) the name and address of the person to whom sold or exchanged, and if to persons other than consumers, the business of each such persons. Such record shall be retained on the premises of the producer, and shall be open for inspection by any internal revenue officer.

ART. 3. *Compensating tax on imported articles.*— A compensating tax became effective with respect to all articles processed or manufactured wholly or in chief value from hogs, and imported on and after November 5, 1933, into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the

United States to which the Act does not apply. A compensating tax became effective with respect to articles processed wholly or partly from hogs, and imported after 11.23 a. m., May 9, 1934. The tax applicable to such articles is given in article 4 of these regulations. For detailed regulations as to this tax consult Chapter IV of Regulations 81, as amended by Treasury Decision 4501, approved December 4, 1934 [I. R. B. XIII-51, 21].

ART. 4. *Rates of tax or of refund with respect to articles processed from hogs.—(a)* Effective March 1, 1934, the rates of compensating tax or of refund, with respect to articles processed from hogs, are as follows:

(Rates of tax shown are cents per pound.)

Article.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked	Cooked, dried, or canned
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	2.97	2.97	2.81	3.15	4.00
Head included, leaf removed	3.01	3.01	2.85	3.19	4.07
Head removed, leaf included	3.10	3.10	2.94	3.28	4.18
Head and leaf removed	3.12	3.12	2.97	3.30	4.23
Wiltshire side	3.26	3.26	3.10	3.46	4.41
Cumberland side	2.97	2.97	2.81	3.15	4.00
Regular ham	4.36	4.36	4.14	4.63	5.44
Skinned ham	4.92	4.92	4.61	5.15	6.57
Boneless ham	5.67	5.67	5.37	6.00	7.65
Rough shoulder	1.91	1.91	1.82	2.02	2.58
Regular shoulder	2.00	2.00	1.93	2.11	2.70
Skinned shoulder	2.11	2.11	2.00	2.25	2.85
Picnic	1.71	1.71	1.62	1.82	2.31
Boneless picnic	2.22	2.22	2.13	2.36	2.90
Shoulder butt and butt	2.76	2.76	2.61	2.92	3.73
Boneless butt	4.02	4.02	3.82	4.27	5.44
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	3.03	3.03	2.90	3.21	4.09
Pork loin	4.86	4.86	4.61	5.15	6.57
Fat back	1.95	1.95	1.86	2.07	2.63

(Rates of tax shown are cents per pound.)

Article.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked	Cooked, dried, or canned
		Dry salt.	Pickle.		
Spareribs	1.48	1.48	1.41	1.57	2.00
Belly D. S. Trim	2.79	2.79	2.65	2.94	3.75
Belly S. P. trim and briskets	4.05	4.05	3.84	4.29	5.46
Plate, jowl, and trimmings	1.80	1.80	1.71	1.91	2.43
Head	1.35	1.35	1.30	1.41	1.82
Neck bones and feet	.42	.42	.40	.45	.58
Tails, livers, hearts, kidneys, and brains	.99	.99	.94	1.05	1.32
Snouts, ears, lips, and miscellaneous edible offal	.49	.49	.47	.51	.67
Cheek meat	1.98	1.98	1.89	2.11	2.65
Tongues	3.73	3.73	3.53	3.96	5.04
Lard	2.47	.....	.....	.....	.....
Pork sausage	1.80	1.80	1.71	1.91	2.52
Dried sausage (including cervelats and salamis)	1.35	1.35	1.28	1.43	1.89
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1.71	1.71	1.62	1.83	2.39
Sausage, pork content[1]	1.80	1.80	1.71	1.91	2.52

[1] (1) If the taxpayer or person entitled to refund can show to the satisfaction of the Commissioner that any or all of the types of sausages processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the conversion factor prescribed therefor, then for each pound of pork, green weight, which said sausages are shown to contain, the rate of tax applicable in such case shall be the respective rate for pork sausage shown in the schedule above. The whole (actual) weight, as well as the total pork content, shall be reported.

(2) In the case of an edible product not named above, which (a) is wholly or partly of pork, and is subject to the payment of a compensating tax, or with respect to which a refund of tax is allowable upon exportation, or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (b) is wholly or in chief value of pork, with respect to which a credit or refund of tax upon floor stocks is allowable, the amount of tax to be paid, or credit or refund to be allowed, shall be based upon the pork content thereof at the rate given above for each cut from which the pork contained in such product was derived. With respect to each such product there shall be entered on the claim (a) the whole (actual) weight, (b) the pork content, and (c) the rate of tax, corresponding with that shown for the cut in the schedule above.

(3) The establishment of the pork content of products as provided in (1) and (2), above, shall be substantiated by authentic records or other satisfactory proof.

ART. 5. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, or Regulations 83, September, 1934, edition, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to hogs are hereby prescribed:

Form No.	Designation.	Required by—
P.T.Form 4A..	Return of processor of hogs —other than a producer or feeder who slaughters for market—class 1.	Article 2(*c*), above.
P.T.Form 4B..	Return of processor of hogs —class 2.	Article 2(*d*), above.
P.T.Form 4X, revised.	Return of producer-processor or feeder-processor of hogs —class 3.	Article 2(*e*), above.
P.T.Form 24..	Claim for refund of taxes illegally collected.	Regulations 81, article 31(*a*).
P.T.Form 24C	Claim for refund of, or credit for, tax paid with respect to articles delivered for charitable distribution or use.	Regulations 81, article 32, as amended.
P.T.Form 27..	Claim for refund of tax paid with respect to articles exported.	Regulations 83, revised.
P.T.Form 28..	Claim for credit, on return, of overpayment.	Regulations 81, article 31(*b*).

ART. 6. *Effective date.*—Treasury Decision 4425, approved March 20, 1934 [C. B. XIII-1, 459], shall remain in force and effect in so far as it relates to liability for tax incurred and refund accrued prior to November 1, 1934, except that it shall not remain in force and effect in so far as it relates to compensating tax incurred and refund of compensating tax and export refund accrued after 11.23 a. m., eastern standard time, May 9, 1934. These regulations shall be in force and effect as of the earliest moment of November 1, 1934, except that they shall be in force and effect as of 11.23 a. m., eastern standard time, May 9, 1934, in so far as they relate to liability for compensating tax incurred and to refund of compensating tax and export refund accrued after that time.

CHAS. T. RUSSELL,
Acting Commissioner of Internal Revenue.

Approved January 25, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

No. 7984

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARMOUR & COMPANY, a corporation,
Appellant,

vs.

NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEE

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ARMOUR & COMPANY, a corporation,
Appellant,

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NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California,
Appellee.

BRIEF FOR THE APPELLEE

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California, Central Division, rendered August 30, 1935 (R. 67), but not yet reported.

Jurisdiction

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the processing of hogs, and is taken from an interlocutory order and decree of the District Court granting appellee's motion to vacate the preliminary injunction which was entered

August 30, 1935. (R. 67.) The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 14, 1935 (R. 80-81), pursuant to Section 129 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether this suit is prohibited by Section 3224 of the Revised Statutes.

2. Whether this suit may be maintained where the appellant has a plain, adequate, and complete remedy at law.

3. Whether the bill presents a substantial question on the merits.

Statutes Involved

The applicable provisions of the statutes involved will be found in Appendices A and B in the brief for appellee in the case of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, now pending before this Court.

Statement

This suit was commenced in the District Court for the Southern District of California, Central Division, on August 3, 1935, by Armour & Company, a corporation, as plaintiff, against Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, as defendant. (R. 3, 46.) From the bill of complaint and petition for injunction (R. 3-46) and the supplemental bill of complaint (R. 73-79), it appears that appellant is

a New Jersey corporation with its principal offices and place of business at Chicago, Illinois, and authorized to do business in the State of California with an office and place of business at Los Angeles in said State, where it is engaged in the business of processing hogs within the purview of the Agricultural Adjustment Act (R. 3). The appellee Nat Rogan is United States Collector of Internal Revenue at Los Angeles, California. (R. 4.)

At the time of filing the bill of complaint, processing taxes had been assessed against appellant with respect to the processing by it of hogs during the month of June, 1935, in the amount of $15,789.69, which became due and payable on or before July 31, 1935, under the terms of the Agricultural Adjustment Act. (R. 13.)

Appellant avers that unless such tax is paid within ten days from the receipt of notice and demand, the appellee will proceed to collect the tax by summary or other proceedings, and that such failure of payment will cause appellant to be liable to the imposition of interest and penalties and its property subjected to a lien. (R. 13.)

The bill prays for temporary and thereafter permanent injunction against the appellee, restraining him from collecting or attempting to collect in any manner said taxes from appellant. (R. 25-27.) As a basis for such injunctive relief, the bill charges that the Agricultural Adjustment Act, as amended, is unconstitutional, and the taxes imposed thereunder are illegal for reasons not here material (R. 16-24); that there is a threat of removal of appellant's remedy at law to litigate the validity of such tax and the constitutionality of said Act because there

was pending before the Congress a bill amendatory of the Agricultural Adjustment Act, which purported to deny to a processor the right to bring suit for the refund of processing taxes in the event said Act should be declared unconstitutional (R. 22); that in the event appellant fails to pay said taxes then due and those thereafter accruing, it will be subject to the imposition of heavy criminal and other penalties thereby irreparably injuring its business, good will and credit, and subjecting it to a multiplicity of suits (R. 23).

The court issued a temporary restraining order and rule to show cause, returnable August 9, 1935 (R. 47-48), on which date the court ordered the issuance of a preliminary injunction (R. 53), which was entered on August 15, 1935 (R. 54-58). Prior to the hearing on the motion for preliminary injunction, appellee filed a motion to dismiss the bill of complaint (R. 51-52), which motion was denied (R. 53).

Under date of August 22, 1935, appellee Nat Rogan filed his motion to vacate the injunction theretofore granted in said cause (R. 62-64), which motion was sustained on August 30, 1935 (R. 67-68). This appeal is from the interlocutory decree sustaining appellee's motion to vacate the preliminary injunction. (R. 80-97.)

Subsequent to the entry of the order sustaining appellee's motion to dissolve said injunction, appellant filed its supplemental bill of complaint (R. 73), which pleads the enactment of amendments to the Agricultural Adjustment Act which became effective August 24, 1935, and charges that said amendments have taken away from

appellant all remedy at law for the recovery of processing taxes, and that such amendments are void, invalid and unconstitutional, upon the grounds set forth in the original bill of complaint as to the validity and unconstitutionality of the Act prior to the amendment. The supplemental bill further avers that additional processing taxes for succeeding months, including the month of August, 1935, have accrued, become due and payable, and that appellant's property is liable to distraint and seizure unless such taxes are paid. (R. 73-78.) An injunction pending appeal has been granted by this Court.

Argument

This appeal involves the identical questions that are presented in the appeal of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, now pending before this Court. The appellee's position is fully presented in the brief for the appellee filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellee's brief in that appeal are served herewith upon counsel for the appellant.

Conclusion

For the reasons stated in the brief for appellee in the appeal of *Standard Packing Company v. Nat Rogan, Collector,* No. 7981, it is urged that the court below correctly denied appellant's motion for preliminary injunction. Because the court below is without jurisdiction to restrain or enjoin the collection of the taxes described in the bill, or to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be

remanded to the District Court with instructions to dismiss the bill.

Respectfully submitted,

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November, 1935.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Armour & Company, a corporation,
Plaintiff and Appellant,

vs.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California,
Defendant and Appellee.

BRIEF OF APPELLANT UPON APPLICATION FOR INJUNCTION PENDING APPEAL.

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Defendant and Appellee.

BRIEF OF APPELLANT UPON APPLICATION FOR INJUNCTION PENDING APPEAL.

STATEMENT.

The appeal is from an order of the District Court entered by the Honorable Paul J. McCormick, vacating a temporary injunction theretofore issued by the terms of which defendant and appellee was enjoined from collecting processing taxes assessed to plaintiff and appellant.

A transcript of the record is being prepared which contains all documents filed in the trial court. There is also attached to the petition for injunction pending appeal a copy of all documents filed in the District Court except

the praecipe, bond on appeal and petition for rehearing. The references in this brief to the supplement to the petition are designated as "Supp."

Plaintiff is engaged in the meat packing business and is a processor of hogs. The complaint was filed August 3, 1935. It appears at Supp. pp. 1 to 44. An injunction was sought against the collection of approximately sixteen thousand dollars ($16,000.00) of processing taxes assessed for the month of June, 1935, and also against any amounts which might be assessed for subsequent months. It was alleged that the Agricultural Adjustment Act, under which said assessments were being levied, was unconstitutional upon the grounds and in the particulars set forth in paragraph XVII of said bill [Supp. pp. 14 to 17]; that there were pending in the Congress of the United States certain proposed amendments to the Agricultural Adjustment Act which would have the effect of either defeating or substantially impairing any remedy which plaintiff possesses for the recovery of said taxes in the event said Agricultural Adjustment Act should be finally held to be unconstitutional [Supp. pp. 17 to 20]; and that the amendment before the Senate of the United States (which proposed amendment is set forth in paragraph XVIII, and which was then in a form somewhat similar to the amendment as it was subsequently passed) would have the effect of imposing onerous conditions which could not be complied with by plaintiff because the facts are incapable of ascertainment and that the right of refund therein provided was purely illusory and did

not constitute any adequate remedy at law or any remedy whatsoever. [Supp. pp. 19, 20.]

A temporary restraining order was issued, and upon the hearing of the application for temporary injunction, the trial court made and entered an order granting to plaintiff and appellant a temporary injunction. [Supp. p. 45.] Thereafter, and subsequent to the decision of this court in the case of *Fisher Flouring Mills Co. v. Vierhus,* No. 7938, defendant made a motion [Supp. p. 68] to vacate said injunction upon the ground, among others, that the decision of this court in that case made it mandatory upon the trial court to vacate the said temporary injunction. The motion of defendant was granted by the trial court, upon the sole ground that the said decision of this court in said case constituted a binding rule "intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes" under the Agricultural Adjustment Act [Supp. pp. 57, 58]. Thereafter, petitioner filed a petition for rehearing which was set for hearing on the 12th day of September, 1935, and which said petition was, at said time, denied by the court. [Supp. p. 92.]

On September 12, 1935, petitioner obtained leave of court to file the supplemental complaint, copy of which is attached to the petition. [Supp. pp. 50-56, 93.] It was alleged in said supplemental bill that Congress had passed, and the President had approved, amendments to the Agricultural Adjustment Act, which had the effect of depriv-

ing plaintiff of any remedy at law to sue for the refund of processing taxes. The amendments referred to are set forth in the petition, pages 8 to 10, and Supp., pages 50 to 54.

Upon application for injunction pending appeal, the trial court made its order [Supp. p. 63] to the effect that *such application should be presented to this court,* in view of its recent decision in the said case of *Fisher Flouring Mills v. Vierhus.*

An appeal has been taken from the said order vacating the temporary injunction. Copies of the order allowing an appeal and of the assignment of errors appear in the supplement, pages 63 and 76-88.

Brief or Summary of Argument and Statements of Points Relied on Upon This Application for Injunction Pending Appeal.

I. AN INJUNCTION PENDING APPEAL SHOULD BE GRANTED SO THAT THE FORCE AND EFFECT OF THE TEMPORARY INJUNCTION HERETOFORE GRANTED BY THE TRIAL COURT UPON PLAINTIFF'S APPLICATION MAY BE RESTORED, SAID INJUNCTION HAVING BEEN GRANTED UPON A SHOWING OF UNCONTRADICTED FACTS WHICH REQUIRED, AND WERE DEEMED BY THE TRIAL COURT TO REQUIRE, INJUNCTIVE RELIEF.

(a) The temporary injunction was granted by the trial court upon plaintiff's uncontradicted showing of facts entitling it to such equitable relief.

(b) The temporary injunction was vacated by the trial court not upon any showing of any change in

circumstances, but solely upon the ground that the decision of this court in *Fisher Flouring Mills Co. v. Vierhus,* rendered August 15, 1935, required the trial court to refrain from exercising its independent judgment, and to vacate the injunction; and upon the same ground the trial court refused to consider plaintiff's application for injunction pending appeal. Said decision, however, was based upon a dissimilar set of facts and upon a statute entirely different from that now governing claims for refunds.

(1) The decision in the *Fisher Flouring Mills Co.* case was based upon the "showing" then made and especially upon the petitioner's contention that it *had passed* the processing tax on to purchasers, whereas the present complaint and application shows that this petitioner has not, and cannot, pass such tax to the purchaser.

(2) The decision of the court in *Fisher Flouring Mills Co. v. Vierhus* was based upon the *refund law as it stood at that time* under which a claim for refund was not subject to the restrictions and limitations of the amendments to the Agricultural Adjustment Act, approved August 24, 1935.

II. Failure to preserve the status quo pending appeal would result in irremedial injury to petitioner, and in view of the fact that the questions presented by the appeal are matters upon which no direct authoritative precedent exists, and the solution of these questions, including that of the effect of the 1935 Amendments to the Agricultural Adjustment Act, is of great public importance, an injunction should be granted pending the appeal of this case; and this, irrespective of the court's present opinion of the merits of the appeal.

28 *U. S. C. A.,* Sec. 377;

Foster etc. v. Haydel, 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154;

Cotting v. Kansas City Stock Yards Co. (C. C. Kan.), 82 Fed. 850, 857;

Louisville & N. R. Co. v. Siler (C. C. Ky.), 186 Fed. 176, 203;

City of Pasadena v. Superior Court, 157 Cal 781, 790, 795.

III. An injunction pending appeal should be granted to petitioner for the reason that petitioner under the amendments to the Agricultural Adjustment Act approved August 24, 1935, has no plain, complete, or adequate remedy at law.

(a) Under the Agricultural Adjustment Act as amended August 24, 1935, petitioner's remedy at law is restricted and limited by the following requirements, among others:

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue

that claimant did not directly or indirectly include the amount of the claim in the price of the article or pass on "*any part* of such amount to the vendee or to any other person *in any manner*" or include "*any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amounts." Sec. 21 (d) (1).

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the Commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21 (d) (1).

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months *after* the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21 (d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe". Sec. 21 (d) (2).

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time." Sec. 21 (d) (2).

(b) The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to obtain the ends of justice as the remedy in equity.

28 U. S. C. A., Sec. 384;

Cable v. U. S. Life Ins. Co., 191 U. S. 288, 303, 48 L. Ed. 188, 192;

Standard Oil Co. v. Atlantic Coast Line R. Co. (D. C. Ky.), 13 Fed. (2) 633, 637; aff. 275 U. S. 257, 72 L. Ed. 270;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Clark v. Pigeon River Imp. etc. Co. (C. C. A. 8), 52 Fed. 550, 557;

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2) 269, 271;

Nutt v. Ellerbe (Three-judge court, S. C.), 56 Fed. (2) 1058, 1063;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 1116;

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823;

Magruder v. Belle Fourche Valley Water User's Association (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

(c) The remedy provided by the Act as amended is not only not adequate, prompt or complete, but in practical operation will necessarily involve a multiplicity of suits.

Postal Cable Tel. Co. v. Cumberland T. & T. Co., 177 Fed. 726, 734 (C. C. Tenn.);

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326, 327 (Okla.).

ARGUMENT.

I.

An Injunction Pending Appeal Should Be Granted So That the Force and Effect of the Temporary Injunction Heretofore Granted by the Trial Court Upon Petitioner's Application May Be Restored, Said Injunction Having Been Granted Upon a Showing of Uncontradicted Facts Which Required and Were Deemed by the Trial Court to Require Injunctive Relief.

(a) The Temporary Injunction Was Granted by the Trial Court Upon Plaintiff's Uncontradicted Showing of Facts Entitling it to Such Equitable Relief.

The facts alleged in plaintiff's complaint were not controverted in the District Court. Defendant's motion to dismiss the complaint was denied and his objections to the granting of a preliminary injunction were overruled. [Supp. p. 89.]

The showing as to the probable invalidity of the Act and of special facts from which it appeared that the remedy at law available to plaintiff did not furnish it prompt, complete, or adequate relief, that a multiplicity of suits would result, and that irreparable damage would be sustained by plaintiff was regarded as sufficient to warrant equitable relief under the cases of:

Dows v. City of Chicago, 11 Wallace, 108;

Hill v. Wallace, 66 L. ed., 822., 259 U. S. 44, 62;

Wilson v. Southern Railway Company, 68 L. ed. 456, 263 U. S. 574, 577;

Miller v. Standard Nut Margarine Co., 76 L. ed. 422, 284 U. S. 498, 509;

Lee v. Bickell, 292 U. S. 415, 78 L. ed. 1337. 1341.

That there is at least a serious doubt as to the constitutionality of the Act appears from the decision in *Butler v. U. S. A.,* (C. C. A. 1) decided July 13, 1935, II U. S. Law Week. 1064.

(b) The Temporary Injunction Was Vacated by the Trial Court Not Upon Any Showing of Any Change in Circumstances, But Solely Upon the Ground That the Decision in Fisher Flouring Co. v. Vierhus Required the Trial Court to Refrain From Exercising Its Independent Judgment, and to Vacate the Injunction; and Upon the Same Ground the Trial Court Refused to Consider Plaintiff's Application For Injunction Pending Appeal. Said Decision, However, Was Based Upon a Dissimilar Set of Facts and Upon a Statute Entirely Different From That Now Governing Claims for Refunds.

The District Court said, in its order vacating the temporary injunction, with reference to the decision in the *Fisher Flouring Mills Co.* case,

> "such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." [Supp. p. 58.]

Upon the same ground the District Court refused to consider appellant's application for an injunction pending appeal, or for a *supersedeas.* [Supp. p. 63.]

The decision of this court in the *Fisher Flouring Mills Co.* case was expressly *confined to the "showing" there*

made, and is clearly distinguished from the present case upon two main grounds:

(1) The decision in the *Fisher Flouring Mills Co.* case was based upon the petitioner's contention that it *had passed* the processing tax on to purchasers, whereas the present complaint and application shows that this petitioner has not, and cannot, pass such tax to the purchaser.

It is alleged in the complaint herein [Supp. pp. 12, 13]:

"That the plaintiff is *not able* to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture and also the existing processing tax of $2.25 for each 100 pounds live weight of hogs purchased by it; that more than fifty (50) separate and distinct products result from the processing of a hog, all of which products are sold by the plaintiff that, because of the nature of the business of purchasing and processing hogs and selling the resulting products it is *impossible* for the plaintiff or for any one else to ascertain what portion of the processing tax, payable because of the processing of any 100 pounds live weight of any hog, is assignable to the products resulting from such processing, in that in the normal course of business of the plaintiff, a hog is purchased on a given day, is processed the same or the next day and the products are sold as individual pieces from ten days to four months later, during which time the market prices at which such products are sold have been constantly and daily fluctuating; that said processing taxes paid and to become due and payable by plaintiff under said Act *cannot be recovered or recouped* by it as a result either of adding said tax to the

product or of subtracting the said tax from the price paid to the raisers of hogs, for the reason that hogs are bought and pork products are sold in competitive markets; that the price at which pork products can be sold in the market is determined, not only by competition from other packers, but also by competition which other food products give pork, by consumer demand and by the price which the consumer will pay."

The foregoing statements were not controverted in any manner before the District Court.

(2) The decision of the court in *Fisher Flouring Mills Co. v. Vierhus* was based upon the *refund law as it stood at that time* under which a claim for refund was not subject to the restrictions and limitations of the amendments to the Agricultural Adjustment Act, approved August 24, 1935.

The provisions of section 156 of Title 26 U. S. C. A. which governed the remedy of refund at the time the decision in the *Fisher Flouring Mills Co.* case was announced on August 15, 1935, unlike the amended Act now in force, placed no restraint as to the amount of such tax paid by the petitioner which could be recovered by it in the event the Act, pursuant to which such taxes were assessed, levied, and collected, should finally be held invalid; contained no requirements that it be proved that the tax had not been passed on in any manner; did not limit the record in the District Court to the record of the proceedings before the Commissioner; did not bar the filing of claims until the Act had been finally held invalid nor require that claim to be filed subject to any regulations thereafter to be prescribed or to any regulations; and did not postpone the right to sue until one year after the date of filing such claim.

II.

Failure to Preserve the Status Quo Pending Appeal Would Result in Irremedial Injury to Petitioner, and in View of the Fact That the Questions Presented by the Appeal Are Matters Upon Which No Direct Authoritative Precedent Exists, and in View of the Fact That a Solution of These Questions, Including That of the Effect of the 1935 Amendments to the Agricultural Adjustment Act, Is of Great Public Importance, an Injunction Should Be Granted Pending the Appeal of This Case, and This, Irrespective of the Court's Present Opinion of the Merits of the Appeal.

A denial by this court of this application for injunction pending appeal would have the effect of precluding any further prosecution of this appeal. The collector will proceed to enforce payment of the tax involved, so that the action will become moot. It will be impossible for plaintiff to obtain in this or any other proceeding a decision on the merits of the questions presented by the complaint.

In *Foster, etc. v. Haydel,* 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154 the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. Pennsylvania v. West Virginia, *supra*; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716 726, 35 L.

R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

In *Cotting v. Kansas City Stock Yards Co.,* (C. C. Kan.) 82 Fed. 850, 857 the opinion was by Justice Thayer. A suit to enjoin the enforcement of a state statute fixing minimum charges was dismissed but an injunction pending appeal was allowed, the court saying:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the supreme court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance, by the supreme court in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that

right. The court is of opinion that the cases at bar are of such moment, and the questions at issue *so balanced with doubt as to justify and require* an exercise of the power in question." (Italics ours unless otherwise noted.)

To the same effect is *Louisville & N. R. Co. v. Siler,* (C. C. Ky.) 186 Fed. 176, 203.

As stated in *City of Pasadena v. Superior Court,* 157 Cal. 781, 790, 795:

"In Polini v. Gray, L. R. 12 Chan. Div. 438, it is said by the master of the rolls: 'It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruit of that litigation and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of the first instance before the first trial, and to the court of appeals before the second trial, as to the court of last instance before the hearing of the final appeal.'

* * * * * * * * *

"Common fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in having the subject-matter of the litigation preserved intact until the appellate court could settle the controversy."

City of Pasadena v. Superior Court, 157 Cal. 781, 790, 795.

III.

An Injunction Pending Appeal Should Be Granted to Petitioner for the Reason That Petitioner Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

(a) The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly* include the amount of the claim in the price of the article or pass on "*any part* of such amount to the vendee or to any other person in *any manner*" or include "*any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amount." Sec. 21 (d) (1).

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the Commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21 (d) (1).

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21 (d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue with

the approval of the Secretary of the Treasury, may prescribe." Sec. 21 (d) (2).

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time." Sec. 21 (d) (2).

(1) The requirement that the claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly include* the amount of the claim in the price of the article or *pass on "any part* of such amount to the vendee or to any other person in *any manner"* in effect, deprives petitioner of all remedy at law.

This result is not due to any fault of petitioner, but arises from the fact that the law provides no criterion for the determination of the indirect incidence of the tax. The factors involved in the determination of this question can only be presented by a month by month showing of the circumstances of each purchase and each sale in the course of petitioner's business.

As pointed out in the Complaint [Supp. pp. 12, 13] in the Supplemental Complaint [Supp. pp. 51, 52] and in the Petition [pp. 11 to 17] plaintiff is unable to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture together with the amount of the processing tax. More than 50 separate products result from the processing of a hog, and because of the nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for plaintiff or any one else to ascertain what portion of the processing tax payable upon the

processing of the hog is assignable to the products resulting therefrom.

It is impossible to segregate the item of processing taxes and determine to what extent, if any, the sales price of pork products is affetced by said tax. The tax is paid on the live weight of the hog. Immediately upon such processing the hog is converted into numerous different articles, each of which is affected by separate and distinct market trends and conditions, and subject to continual fluctuations over periods of time, varying in length with each article, but running from a period of a few days to several months. Upon conversion into said articles the commodity loses its identity. The prices obtained by petitioner on the sale of said articles or products are determined by competition in the open market with the products of other packers and also with other food products. These prices fluctuate daily and over a wide range. The determination of the extent to which the purchase price obtained by petitioner might constitute or be properly held to constitute a portion of the processing tax theretofore paid by petitioner would involve the consideration of factors which it is impossible for petitioner to establish by proof, even though petitioner keeps the most accurate and complete records which the situation permits. Even if the price obtained by petitioner upon the sale of the articles converted from any particular hog could be determined—and as shown in the petition the same is impossible of ascertainment—the problem would still remain of determining what portion of the sale price so obtained is to be allocated to the reimbursement of the tax to petitioner, and what portion, if any, to petitioner's costs other than by reason of said tax. The provision of the Act by which it is required that petitioner in order to obtain a refund

must establish facts not susceptible of proof, or even conjecture, renders the purported remedy entirely illusory, arbitrary, unreasonable and inadequate.

Under the amended Act petitioner would not be entitled to a refund of any portion of the tax paid if "any part of such amount" has been passed on to the vendee, so that petitioner, in order to clearly establish a claim for refund, would, apparently, be required to show that no consideration whatever was obtained on sale of its products. Despite the fact that petitioner has not passed the tax to the vendee, and in fact has suffered a loss of several thousand dollars monthly for several months past in the operation of its hog business, it will, nevertheless, be unable to recover back the amount of any tax illegally levied.

The provisions of Section 156 of Title 26 of U. S. C. A., which applied to claims such as petitioner's prior to the amendment of August 24, 1935, placed no restraint whatsoever as to the amount of illegal tax paid by petitioner which could be recovered by it nor was there any requirement that plaintiff prove that the tax had not been passed on directly or indirectly to the vendee or to any other person in any manner.

The requirement imposed by the Act in this respect goes far beyond any provision of any previous statute.

In the case of *United States v. Jefferson Electric Manufacturing Co.,* 78 L. Ed. 859, 868, 871, 291 U. S. 386, 394, 402 (relied upon by appellee), the court held that the automobile accessory manufacturers' excise tax refund provision did not constitute a lack of *due process.* No question of the relative adequacy of legal and equitable remedies was involved. The provision of Section 424 of the Excise Tax Act involved in that case merely required

that the claimant establish "that such amount was not collected directly or indirectly from the purchasers." In the present Act the right to a refund is subject to the further requirements in this respect that the tax shall not have been included in the price "of any article processed from the commodity with respect to which it was imposed" and the claimant must show that he has not "passed on any part of such amount to the vendee or to any other person in any manner." He must also show "That the price paid by the claimant * * * was not reduced by any part of such amount." The Excise Tax Act further expressly provided, unlike the Agricultural Adjustment Act as amended, for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax. The tax involved in that case was upon the identical articles sold and not upon some other commodity from which the said articles had been converted. Likewise, the Excise Tax involved was made to take effect upon the very act of sale of the articles and not upon some prior transaction respecting some commodity from which these articles had subsequently been converted. The manufacturer therefore was not beset with the difficulties presented by the processing tax and was in a position to readily show whether the tax arising upon the sale had actually been borne by himself or by the purchaser; nor was the right to refund of the entire tax prejudiced or defeated by failure to prove that some part of the tax had not been collected from the purchaser.

Obviously there was nothing arbitrary in the requirement of that Act that the manufacturer either prove that he had not collected the tax from the purchaser or give a bond to reimburse the purchasers. The case is no authority for the contention that the existence of a right of re-

covery, even under the provisions of that Act, should stay the hand of equity in enjoining the enforcement of exactions of taxes, the validity of which is questioned. Certainly no case has gone so far as to hold that equity will consider as adequate a remedy at law which is subject to the drastic limitations of the Agricultural Adjustment Act as amended; and any such ruling would be directly contrary to the well established rule of prior decisions that the remedy at law in order to deprive equity of jurisdiction must be adequate, speedy, plain, and complete, and not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation or is not as efficient to the ends of justice or to its prompt administration as the remedy in equity. (See cases discussed under point (b) *infra.*)

As set forth in plaintiff's complaint, the original bill amending the Agricultural Adjustment Act as passed by the House of Repreesntatives took away entirely the right of a processor to recover taxes illegally collected. It is evident from a consideration of the operation of the amendment as finally passed that while it does not purport to take away entirely the remedy of the processor, it will in actual operation have that effect. If the Act had gone through as originally proposed it would have been unconstitutional as an attempt to cure an illegal and unauthorized tax by denying all remedy to the taxpayers. (*Graham v. Goodcell,* 282 U. S. 409, 430, 75 L. Ed. 415, 441.) The amendment as passed, is calculated to reach the same result by presenting such substantial and, in fact insuperable, obstacles that the nominal remedy is not actually available or effective.

(2) The provision that in any judicial proceeding relating to the claim for refund "a transcript of the hearing

before the Commissioner shall be duly certified and *filed as the record* in the case and shall be so considered by the court" (Sec. 21(d), Subdivision(1)), is such a limitation on the remedy at law as to constitute the same wholly inadequate.

The constitutional questions which arise under the Act as amended are questions which the claimant is entitled to present before a court which is empowered to hear any and all competent evidence, and which is not limited to the review of evidence before some inferior tribunal.

In *Chicago, B. & Q. R. Co. v. Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, the court held that a provision for a writ of error to the Supreme Court of the state to review the record of a board of equalization is not an adequate remedy. The court said:

> "When such a charge as the present is made, it can be tried fully and fairly only by a court that *can hear any and all competent evidence,* and that is not bound by findings of the implicated board for which there is any evidence, always easily produced."

(3) The provision that no suit for refund under the Agricultural Act as amended based upon the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months *after* the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto (Sec. 21(d) (2)), renders such remedy uncertain and inadequate.

It is doubtful, under this provision, whether claimant could, at the present time, file any claim or initiate any proceeding for the recovery at law of any tax paid by it. Apparently the initiation of such action must await a deci-

sion of the Supreme Court by which the Agricultural Adjustment Act as amended is finally held invalid. This uncertainty as to the availability, at present, of the remedy provided, is sufficient alone to give equity jurisdiction of the present action under the cases discussed under point (b) *infra.*

(4) The provision that any claim filed for refund must conform "to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe" (Sec. 21 (d) (2)), in view of the fact that, as stated in the petition, no such regulations have been prescribed [Supp. p. 55], renders the remedy at law inadequate.

As stated in the case of *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823:

> "In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted,* and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.*"

(5) The provision that no suit or proceeding shall be begun on any claim before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time (Sec. 21 (d) (2)) presents a further limitation upon the legal remedy which, in view of the facts of this case, renders the legal remedy inadequate.

The limitation prescribed by Section 156 of Title 26, U. S. C. A., which was applicable to all such refund claims prior to August 24, 1935, was six months. The extension

of such period for an additional period of six months, in view of the multiplicity of issues necessarily presented by a claim for refund by petitioner, and the vast amount of detailed evidence necessary to present a claim for each month of the year, renders the remedy provided so inadequate and impracticable as to warrant the interposition of equity.

(b) The Rule Is Well Settled That a Court of Equity Is Not Deprived of Jurisdiction to Grant Injunctive Relief Where the Remedy at Law Is Not Equally Plain, Speedy, Complete or Practical, and as Efficient to Attain the Ends of Justice Both in Respect of the Final Relief Sought, and the Mode of Obtaining It, as Is the Relief in Equity.

In *Cable v. U. S. Life Ins. Co.,* 191 U. S. 288, 303, the court said at page 303 (192):

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to *without impediment created otherwise than by the act of the party,* and the remedy of defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, *arising other than by reason of its own act.*"

In *Standard Oil Co. v. Atlantic Coast Line R. Co.* (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637; aff. 275 U. S. 257, 72 L. Ed. 270, the court held that equity could assume

jurisdiction of an action to enjoin a railway from charging excess freight over reasonable charges and for accounting for past excess charges. The Court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable, and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity. ***
>
> "No recovery could be allowed a plaintiff in such an action until he had established to the satisfaction of the jury, not only that the rates charged were unreasonable, but the *extent* of their unreasonableness. ***
>
> "So it is extremely doubtful if a remedy at law which throws upon the plaintiff the burden of proving that rates charged are unreasonable, and leaves to a jury the decision of such a question, is as full, practicable, complete, and efficient, either as to the final relief or the method of obtaining it, as is an equitable remedy which imposes no such burden upon the plaintiff. ***
>
> "So, in trying to enforce in this court its common-law right of action, the plaintiff would be confronted with *substantial obstacles, with which it is not confronted in this equity action.*"

In *Atchison, Topeka & Santa Fe R. Co. v. Sullivan* (C. C. A. 8), 173 Fed. 456, 470, the court held equity had jurisdiction of suit to enjoin collection of a state tax based on illegal discrimination. The Court said:

> "The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as *certain, complete, prompt, and efficient* to attain the ends of justice as the remedy in equity. (Citing cases.)

> The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is *neither as prompt, nor as certain, nor as complete,* as the relief which may be granted through this suit in equity."

In *Clark v. Pigeon River Improvement etc. Co.* (C. C. A. 8), 52 Fed. (2) 550, 557, the Court said:

> "Section 267 of the Judicial Code (Title 28, U. S. C. A., §384) provides that suits in equity shall not be sustained in United States courts where there is a plain, adequate, and complete remedy at law. That remedy, however, must be one that is adequate, speedy, plain, and complete, *not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation* to accomplish the purposes of justice."

In *Munn v. Des Moines Nat. Bank* (C. C. A. 8), 18 Fed. (2) 269, 271, the Court held that the remedy offered

for review of excessive assessments of capital stock, in view of the shortness of time allowed for presenting objections which was occasioned by assessors' delay in completing assessment books, was "not only inadequate but *necessarily impractical and futile.*" The Court said:

> "The adequate remedy which will prevent the maintenance in this court of equity of these suits must be 'as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Nutt v. Ellerbe* (Three-judge court, S. C.), 56 Fed. (2) 1058, 1063, the Court held that a truck owner had no adequate remedy at law with respect to state tax on trucks, no provision being made for interest. The Court said:

> "It has been repeatedly held that the remedy at law must be plain and where there is doubt about it the taxpayer is not required to speculate and take the chances of being able to recover at law."

In *Union Pac. Ry. Co. v. Weld County,* 247 U. S. 282, 285, 62 L. Ed. 1110, 1116, the Court held that injunctive relief against the collection of taxes should not be denied on the ground that an adequate remedy at law exists under the Colorado statute, where the absence of a decision by a court of that state on the effect of an amending statute leaves it uncertain whether the approval of the state tax commission is required or whether in some instances the right to refund is withdrawn.

The Court said, after referring to decisions under the earlier statute:

> "If that section is still in force, *unqualified and unmodified,* the conclusion below that in this case there

is a plain, adequate, and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions.

* * * * * * * * *

"And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is *involved in uncertainty, an essential element of the requisite remedy at law is wanting*; for, as this court has said: 'It is a settled principle of equity *jurisprudence* that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit . . . Where equity can give relief, plaintiff ought not to be compelled to *speculate upon the chance of his obtaining relief at law.*' "

The legal remedy is not adequate unless it is under the control of plaintiff and can be asserted *at the moment.*

In *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823, the court held that a legal defense in an action to enforce penalties for failure to pay license fees was not so adequate as to exclude equity jurisdiction. The court said:

"In order to be adequate, the remedy at law must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as a remedy in equity. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The Supreme Court of the United States, in *Ex parte* Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, held that a suit by stockholders against the corporation to enjoin the directors and officers from complying with the provisions of a state statute,

alleged to be unconstitutional, was properly brought within the equity rule of the court. This was a case where the Minnesota rate law was in question. It was contended that there was an adequate remedy at law, for that the officers could make defense when they were arrested and brought to the bar of the court. The court held that it would not be equal protection to an individual to allow him to come into court and make his defense upon condition that, if he fails, the penalty would subject him to imprisonment, or to extravagant and unreasonable loss. The law, under such circumstances, would impose such conditions as would work abandonment of individual rights, and such a gross hardship as would deny a speedy and adequate remedy at law, especially when penalties are so enormous as to deter a person from asserting a constitutional right and jeopardizing his liberty, or resulting in great loss of property. In Barber v. Barber, 21 How. 591, 16 L. Ed. 226, and Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, the Supreme Court has held, in effect, that the remedy, to be adequate, must, to the chancellor, in exercising sound discretion, appear to be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction; and that the legal remedy, both in respect of the final relief and the motive of attaining it, must be as efficient in law as in equity, was held by the same court, in Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, and unless it appears that the *legal remedy is neither obscure or doubtful as to its adequacy or completeness*, the chancellor should not decline to extend the equitable arm of the court.

" 'Adequate remedy at law,' in Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22, is said to be a remedy

vested in the complainant, to which he may at all times *resort at his own option, fully and freely, without let or hindrance*; and in Bank v. Stone (C. C.) 88 Fed. 383, at page 397, the court said:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. A remedy at law cannot be adequate, if its adequacy depends upon the will of the opposing party.'

"In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted,* and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.* When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, *that doubt should be resolved in favor of the petitioners.*"

In *Magruder v. Belle Fourche Valley Water User's Association* (C. C. A. 8), 219 Fed. 72, 79, defendants were enjoined from exacting from plaintiff's alleged illegal water charges. Decree affirmed. The court said:

"But the remedy at law which precludes relief in equity *must be as prompt,* efficient, and adequate as the remedy in equity. To determine the amounts of the unauthorized charges for operation and maintenance may and probably will require the examination of the accounts of the receipts and disbursements on account of the entire project. To determine the amounts, if any, owing by the shareholders, may and probably will require the examination of the accounts between each of the complaining shareholders

and the project. The consideration and settlement of issues dependent upon the taking of accounts composed of many items is one of the great heads of equity jurisprudence, and the probable necessity for such an accounting is in itself sufficient to sustain the jurisdiction of this suit by a court of chancery."

In *Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co.* (C. C. S. D.) 156 Fed. 160, 167, it was held that equity would take jurisdiction of an action to enjoin a railroad from putting into effect a proposed rate which was alleged to be unlawful, the remedy at law to sue for refund being inadequate. The court said:

"It also seems clear that complainant has no plain, speedy, and adequate remedy at law. In these days of fierce business competition a difference of a fraction of a cent in a freight rate may mean to the jobber or wholesaler success or failure in business. The damages which a shipper will suffer from an unjust or discrmininatory freight rate is not the mere difference between a reasonable and just rate and an unreasonable and unjust rate. The putting in of an unjust rate or an unjustly discriminatory rate may, in addition to the damage caused by the payment of the rate itself, cause business ruin. Must the shipper when notice is given that a carrier intends to put in effect an unjust rate or an unjustly discriminatory rate which the shipper knows will ruin his business *sit still, and let the rate go into effect,* and then complain to the Interstate Commerce Commission, which after three or four years may decide the rate to be reasonable or unreasonable? (Citing cases.) And if the shipper is successful in his contention, he may then with business ruined

go into court to enforce the award of the commission and at the end of three or four years more collect his damages, not those arising from the ruination of his business, but merely the excess paid by him over and above a reasonable rate. There is no plain and adequate remedy in such a proceeding. Courts of equity have often in similar cases enjoined the putting in effect of unlawful rates. (Citing cases.) Also the numerous cases in which courts of equity have enjoined unlawful rates sought to be enforced by state authorities."

(c) The Remedy by the Act as Amended is Not Only Not Adequate, Prompt or Complete, But in Practical Operation Will Necessarily Involve a Multiplicity of Suits.

Under the Act as amended, petitioner will be required to file a claim for refund for each month's tax paid and such claim upon rejection will give a right of action thereon. Whether such actions be brought singly or in groups, the difficulty of the situation as it affects the claimant will be the same. It must prove separately as to each month the amount of tax paid and the circumstances of each purchase and sale during this taxable period. The disadvantage of multiple actions would not be mitigated in the least by delaying action until the causes of action had accumulated or until the end of the statutory period. In any view of the Act as amended the petitioner is remitted to the choice between utterly ruinous delay and engaging in repeated and prolonged litigation only slightly less ruinous. Such a remedy is not, under any of the authorities, an adequate, prompt or complete remedy.

In *Postal Cable Telegraph Company v. Cumberland T. and T. Co.*, 177 Fed. 726, 734 (C. C. Tenn.), the tele-

phone company was enjoined from charging increased rates to a telegraph company. The court said, at page 734:

> "As to the defendant's argument that the complainant has a plain and adequate remedy at law, I am of opinion that in view of the continuing nature of the demand made by the defendant and the multiplicity of suits to which complainant would have to resort to enforce its rights, if it should pay the increased rate and sue to recover the same, the remedy at law would not be complete and adequate, and equity therefore has jurisdiction."

In *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.,* 111 Pac. 326, 327, (Okla.) the court said:

> "The aid of equity may be invoked to stay a wrong, when relief at law would occasion a multiplicity of suits. In Johnson *et al* v. Swanke, 128 Wis. 68, 107 N. W. 481, 8 Am. & Eng. Ann. Cas. 544, this rule is stated that the prevention of a multiplicity of suits as a ground for equitable jurisdiction applies where one party may be sued several times in relation to the same subject-matter in its entirety, or in respect to some element or elements thereof. See, also, Threlkeld v. Steward *et al.,* 24 Okl. 462, 103 Pac. 630. The ultimate criterion is in the utter inadequacy of the legal remedy. With said contract rescinded, the gas bills for both fuel and light would have to be paid monthly, running over a period of years, necessitating the plaintiffs bringing a multiplicity of suits to recover the money paid therefor as to the time the gas was to be furnished free, and the excess for the period it was to be supplied at a reduced price. * * *
>
> "* * * but, as before stated, it is not necessary to determine whether an injunction was the

> proper remedy on this theory, for it is clearly invokable to prevent a multiplicity of suits to redress, you might say, monthly breaches of a contract extending over a period of years."

Even though it may be said that the refund remedy provided by the Act does not necessarily result in a multiplicity of actions in the technical sense, it is obvious that the vast labor and expense of preparing and prosecuting twelve suits yearly and preserving, collecting, and presenting the evidence necessary to maintain them is not lessened in the least by consolidating the twelve claims in one action. The difficulties presented by each suit would be the same whether the suits were prosecuted singly or as "a bundle of suits."

The effect of the recent amendments to the Agricultural Adjustment Act is to multiply the difficulties of a refund suit both by its novel requirements of proof of the circumstances of each purchase and sale and by the enforced delay in the institution of the original proceedings and also in the prosecution of the claim.

The ultimate criterion of the propriety of equitable relief is undoubtedly the adequacy of the legal remedy; and a remedy the present availability of which is doubtful, which is uncertain, impractical, cumbersome, and the exercise of which is bound to be costly to a prohibitive degree, fraught with ruinous delay, and with the continuous hardship of prosecuting twelve refund claims annually, is not that plain, complete, and adequate remedy which will stay the hand of equity.

Conclusion.

The present case, therefore, presents those extraordinary and exceptional circumstances which render Section 3224, Revised Statutes, inapplicable. (*Miller v. Nut Margarine Co.*, 284 U. S. 498, 509.) The appeal presents novel and important questions of law the prompt determination of which is essential for the public interest. Petitioner will not be able to obtain a final determination of these questions unless an injunction pending the appeal is granted. Defendant will not be injured by the preservation of the *status quo* of the subject matter pending appeal if adequate provision is made to secure the amounts assessed. It is earnestly submitted that the circumstances of the present case are such as to justify and require the exercise of the equitable power of this court.

All of which is

Respectfully submitted,

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By J. C. Macfarland,

Attorneys for Plaintiff and Appellant.

Ira C. Powers,
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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Armour & Company, a corporation,
Plaintiff,

vs.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California,
Defendant,

PETITION FOR INJUNCTION PENDING APPEAL.

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SUBJECT INDEX.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Armour & Company, a corporation,
Plaintiff,

vs.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California,
Defendant.

PETITION FOR INJUNCTION PENDING APPEAL.

To the Honorable Judges of the United States Circuit Court of Appeals, in and for the Ninth Circuit:

The petition of Armour & Company, a corporation, your petitioner herein, for an injunction pending appeal respectfully shows:

I.

That your petitioner, Armour & Company, is a corporation, organized and existing under and by virtue of the laws of the state of New Jersey, and transacting business in the states of New Jersey and California.

II.

That it is engaged in the meat packing business and as such is a processor of hogs. That as such meat packer, it

has, for many years past, engaged in such operations in and about hogs, which constitute it a processor within the meaning of that certain Act of Congress passed in May of 1933, which is known as the Agricultural Adjustment Act and which, for the purpose of convenience will be referred to hereafter, in this petition, as the Act.

Under said Act, there are imposed charges upon the live weight of each hog handled by the petitioner, subsequent to November 1, 1933, a charge known as a processing tax. This tax is calculated upon the live weight of the hog and not upon any of the products obtained in the course of processing or manufacture by the petitioner therefrom, and without any heed or provision for evaporation, loss in manufacture and other losses appertaining to the conversion of hogs into products which are commonly derived therefrom by manufacturers of such products. This tax has ranged, ever since November, 1933, from 50¢ per hundred-weight live weight to $2.25 per hundred-weight, which was and is the tax since March 1st, 1934, and this tax under said Act, was in effect at the time of the filing of the suit in the Court below, was determined and proclaimed by the Secretary of Agriculture.

At the end of each calendar month, from the effective date of said Act, petitioner has been obliged, in accordance with said Act, to submit a return to the Collector of Internal Revenue in the District wherein petitioner's manufacturing operations are carried on, showing the operations had during the month.

That, thereupon, an assessment is levied in accordance with the prevailing amount of said tax for and during said period, and constitutes a charge against your petitioner and, against its property and assets of any sort,

and, thereupon, your petitioner, must discharge such assessment by payment of said amount to said Collector of Internal Revenue; if such payment is not made within ten days after demand therefor, your petitioner and its property become liable to penalties, as provided for in said Act, particularly a penalty of 5% of the tax, and interest at 1%, per month. A lien of record can then be placed against tis property by the Collector of Internal Revenue; thereupon, it cannot dispose of any of its property or assets, and the Collector of Internal Revenue, in furtherance of such collection of said taxes, may distrain property and assets of the petitioner for the purpose of realizing therefrom such amount as will satisfy such tax, penalties, and interest appertaining thereto.

The assessments of each and every month consttiute a separate obligation and give rise to the acts that can be taken and had by the collector, as aforesaid, for the purpose of the collection of the assessed amount.

III.

That the amounts derived from the collection of said taxes, whether by payment prior to the accrual of any penalties and interest, as aforesaid, or by way of distraint, are used for the purposes set forth in the Act, and which principally constitute a method for the restriction of production and derivation of higher prices by the raisers of hogs raised in a restricted number, and the amounts secured, generally, in the manner as outlined above, from processors of hogs, are paid, in an amount and in a manner determined by the Secretary of Agriculture, as benefit or compensation payment for the restriction of products so attempted to be controlled to the raisers of hogs.

These amounts are not used for the payment of the public debt, defense of the United States, or in the accomplishment of any governmental function.

IV.

That, in the latter part of June, 1935, your petitioner became convinced that the Act, pursuant to which such processing taxes were sought from it by way of assessment, levy, and collection, were unconstitutional, and the particular specifications wherein such processing taxes are alleged to be unconstitutional are not set forth in full in this petition, for the reason that petitioner has commenced a suit seeking injunctive relief against those charged with the collection of said taxes in the Internal Revenue District in which petitioner carries on manufacturing operations; a copy of this bill of complaint is attached hereto, marked "Exhibit A", and, by such reference, made a part hereof to the same extent to which it would be had it been set out in full in this particular point. The reasons wherein the Act is alleged to be unconstitutional are set forth in paragraphs XVII and XXII thereof.

That, at said time, there was legislation pending before the Congress of the United States of America having to do with the limitation and change of the remedy that a person from whom such tax was collected might be entitled to in the event Courts of the United States finally declared said Act to be unlawful, invalid, and contrary to the Constitution of the United States of America.

Said suit related to the taxes accrued for and during the month of June, 1935, and subsequent months.

V.

That, upon the filing of its bill of complaint and petition for injunctive relief in the District Court of the United States, for that District of California wherein petitioner is a resident, petitioner secured a temporary restraining order, restraining the defendants from doing any act in the levy and collection of said taxes.

Likewise, an order to show cause issued out of said Court, directed to the defendants, to show cause why your petitioner should not have an injunction pending the final determination of its suit.

In its suit, petitioner, in paragraph XXIII thereof, offered to do equity in as far as any of the rights of the defendants were concerned, and, at the time of the hearing, likewise, offered to segregate and set aside the funds constituting the amount of the tax in such a manner that it would be readily available to the defendants in cash.

VI.

That, in the meantime, however, and likewise during the period of time that the matter was under consideration by the Court for its decision and determination as to the propriety of granting injunctive relief pending hearing of the cause, other suits of like nature were commenced by numerous persons similarly situated as plaintiff and in the same line of business.

That, likewise, in such other suits, temporary restraining orders were issued and orders to show cause why temporary injunction should not issue during pendency of said causes. These suits were commenced and assigned in accordance with the method in vogue in the District, and various of the District Court judges had such cases as-

signed to them. For the purpose of uniform consideration thereof, said judges did consider the matter jointly after submission, and did order temporary injunctions to issue.

A copy of the order and decree thereafter entered pursuant to said ruling is hereto attached, and marked "Exhibit B", and constitutes the preliminary injunction of August 8, 1935, hereinafter referred to.

VII.

That, on or about the 24th day of August, 1935, there was enacted by Congress and approval by the President of the United States, an Act amending the above entitled Act in certain particulars, dealing with the remedy of one from whom a processing tax has been collected, to obtain a refund of such payment in the event that the Act, pursuant to which such tax has been collected should subsequently be held finally invalid. The pertinent provisions of these amendments, which so became effective, are in words and figures as follows:

> "Sec. 21 (a) No suit, action or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such

interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed, and ordered paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section may be reserved in the court's order."

That subsection (d) (1) of section 21 of said Act as last amended provides that:

"No recovery * * * shall be made or allowed of * * * any amount of any tax, penalty or interest which accrued before on or after the date of the adoption of this amendment under this title * * * unless, after a claim has been duly filed, it shall be established * * * to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him has directly or indirectly included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. * * *"

That by paragraph (d) (2) of Sec. 21 of said Act as amended it is provided that:

> "(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceedings relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so consid-

ered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail."

That by reason of the enactment of the said Statute, plaintiff has no present remedy at law whatsoever, and is not permitted to sue for refund of processing taxes or to litigate in any tribunal the question of the constitutionality of said Agricultural Adjustment Act, or collection of processing taxes thereunder, or to recover any judgment for the refund thereof.

That by paragraphs (a) and (b) of Sec. 12 of said Act as amended, it is provided that:

> "Sec. 12 (a) There is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administration expense under this title and for payments authorized to be made under Section 8. Such sum shall remain available until expended. * * *"
>
> "(b) In addition to the foregoing for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from all taxes imposed under this title is hereby appropriated to be available to the Secretary of Agriculture for (1) the acquistion of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to co-operate with a program of production adjustment or marketing adjustment adopted under the authority of this title, and (2) the following purposes under part 2 of this title: Administrative expenses, payments authorized to be made under section 8, and refunds on taxes."

VIII.

That on August 15, 1935, a decision was rendered by your Honorable Court, in certain consolidated matters affecting the collection of processing taxes from persons processing wheat, entitled *Fisher Flouring Mills Co. v. Vierhus,* No. 7938.

Petitioner states that the facts presented by the petitions of such persons to your Honorable Court are totally different from the facts presented by petitioner and upon which it seeks equitable relief through the interposition of your Honorable Court. Also, said decision was rendered at a time when petitioner's relief was

measured by proviisons of section 156 of title 26 of U. S. C. A., which placed no restraint as to the amount of such tax paid by the petitioner which could be recovered by it in the event the Act, pursuant to which such taxes were assessed, levied, and collected, should finally be held invalid, which contained no requirement that it be proved that the tax had not been passed on in any manner; which did not limit the record in the District Court to the record of the proceedings before the Commissioner, which did not bar the filing of claims until the act had been finally held invalid nor require that claim be filed subject to any regulations thereafter to be prescribed or to any regulations; and which did not postpone the right to sue until one year after the date of filing such claim.

That during the last session of the Congress of the United States, amendments to said Act were introduced and passed by the House of Representatives thereof on or about the 13th day of May, 1935, which would have deprived petitioner of any and all right of repayment or refund of any of said processing taxes paid to the Collector of Internal Revenue. Petitioner states that the amendments as enacted will have precisely the same effect as those resolutions which by their terms were intended to deprive it of all semblance of remedial relief.

IX.

The tax, as aforesaid, is assessed, levied, and collected on the live weight of the hog; the average weight of a hog handled in the packing industry is about 200 pounds; predicating the matter set forth below upon such average live weight of 200 pounds, your petitioner respectfully submits to you the following facts:

In the course of manufacture the 200 pounds of live weight will result in 28 pounds of hams, 19 pounds of bellies, 26 pounds of shoulders, 20 pounds of pork loins, 4 pounds of spare ribs, 7 pounds of trimmings, 2 pounds of neck bones, 5 pounds of feet, 8 pounds of miscellaneous offal (including hearts, livers, kidneys, tongues, brains, etc., and 24 pounds of lard, or a total of 143 pounds; the balance of 57 pounds will represent moisture and evaporation loss, and the fertilizer material obtained from the hogs.

Of the manufactured articles into which the live weight is converted, a small part of the hams is sold fresh within a few days of the kill (the kill constitutes the act by which the processing tax attaches); the balance of the hams are cured for approximately sixty days, and, by such curing, converted into smoked meats. Bellies are cured for approximately thirty days and then smoked out and either shipped as smoked meats or sliced and sold as sliced bacon or as slabs of bacon. Lard is sold in periods ranging from a week to a year from the time of the kill, depending upon the demand and the market conditions. The other items into which the live weight has been converted, at times may be sold fresh within a period of a few days of the kill, or held from periods ranging from six to eight months before being sold or disposed of. Different market conditions and different types of demand appertain to each of the items into which the live weight of the hog has been converted in manufacture.

The manufacture and conversion in many instances, therefore, is not completed during the taxable period during which the hog has been killed, but, on the contrary,

said manufacture may not be completed for some time thereafter.

Likewise, the disposal of the product obtained in the manufacture of the hog killed during any part of the taxable period is not completed during the taxable period during which the tax for the particular hog is assessed and levied.

X.

Petitioner states that said restricted and limited right to recover processing taxes paid is uncertain, arbitrary and inadequate and affords petitioner no opportunity for relief at law.

That in order to recover any processing tax paid by it, petitioner will be required to show that the price paid by it for a basic agricultural commodity was not reduced by any part of the amount of such processing tax. Petitioner in the past has paid and for the future necessarily will pay for its purchases the competitive open market prices in effect at the time thereof; that the market price of such a commodity is, has been and will continue to be a fluctuating price depending upon market conditions in respect of supply, demand, competition and other factors prevailing from time to time; that the processing tax paid by petitioner for any commodity which it buys is only one of many factors affecting the market price of such commodity at any given time; that the effect of such single processing tax factor upon the market price of a commodity can at no time be isolated and determined and petitioner can not possibly show in respect of any purchase whether, or to what extent, the market price thereof was affected by said tax; yet, unless petitioner shall be

able to show that such price paid by it was to no extent reduced by any part of the amount of such tax, it will be unable to claim or receive any refund; that petitioner could only establish that it had not reduced the price paid to a producer by the amount of any part of such tax by showing that it had paid to such producer the amount of said tax plus the prevailing market price of his produce. That by reason of the fact that petitioner's right to claim and receive a refund of taxes paid by it is limited by said requirement that it shall either establish a fact not susceptible of proof or incur financial ruin, said remedy is wholly illusory, unreasonable and inadequate and no remedy in fact.

That as a first domestic processor of a basic agricultural commodity, petitioner is made liable in the first instance and will be required to pay the prescribed processing tax from its own funds unless it shall prevail herein; that when paid by petitioner, said tax becomes and remains a part of the cost to it of the product which it ultimately sells to its customers; that petitioner has not otherwise included and will not otherwise include the amount of said tax in the prices of its products to its customers and such prices have been and will continue to be such competitive open market prices prevailing from time to time as petitioner's customers would and will pay for such products without specific addition thereto on account of said tax as such; that said amendment does not provide whether a price returned to it upon the sale of one of its products is to be allocated first to the full reimbursement of said tax to petitioner, or first to the full reimbursement to petitioner of its costs other than said tax, or pro rata to all of petitioner's costs; that, due to economic and competitive

conditions prevailing from time to time in the markets in which petitioner buys and sells and to the perishable character of petitioner's products by reason of which it is upon occasions forced to make immediate and disadvantageous sales, it sometimes sells its products at a loss and sometimes at a profit and will necessarily continue so to do; that whenever petitioner sells its goods at a loss, whether and to what extent it shall be considered to have been reimbursed for the processing tax factor of its costs, will depend entirely on how the price received by it shall be allocated to its costs and, because of said indefiniteness and uncertainty of said provision of said amendment, such allocation can be made in any one of the aforesaid three ways, and the use of any one of such ways must be wholly arbitrary; that there is no basis on which the cost or the amount of the processing tax with respect to any particular product made from a hog can be ascertained or determined except one that is arbitrary; that the assumption that a particular hog product shall bear any particular part of the tax is wholly arbitrary; that in respect of a particular sale of one of petitioner's products, it can not be determined with certainty whether such sale resulted in a profit or loss; the question of how the prices returned to petitioner shall be allocated to its costs; that as long as petitioner shall receive any price at all for its products if the price so returned to it is first to be allocated to the full repayment to petitioner of its processing tax costs or if such return is to be allocated pro rata to all of petitioner's costs, then, on either such basis, petitioner would be denied a claim for refund because such price received from its vendee would have included some part of said tax and under said amendment petitioner may not claim and receive a refund if it shall have passed on "any part

of such amount" to its vendee; that under said amendment petitioner will only be clearly entitled to claim and to receive a refund if it shall give its products away for no price or other consideration; that a remedy clearly available to petitioner only if it shall give its products away is wholly illusory and no remedy at all.

XI.

Petitioner states that it cannot pass the said tax in the course of sale. Petitioner is now and for many months past has been operating its hog business at a loss. As a handler of diversified meat commodities, it cannot abandon its hog business, because it would no longer be able to compete with those that handle meat commodities.

XII.

That to make, report, preserve and keep records, accounts and books of account which would so reflect the disposal of each and every hog killed by the petitioner in the course of its operations, is impossible of accomplishment. The attempt to keep records which would approximately reflect these matters, identifying the product handled, as to each hog, would involve expense which would probably exceed the amount of the tax appertaining to each hog.

That the obligation to submit the proof required by the amendments by the commissioner was not in existence prior to the adoption of said amendments, and, though the records, books and papers made, kept and preserved by your petitioner are those accepted as standard in the business in which it is engaged, it cannot present the information which it would be necessary to adduce in order to comply with the burden placed upon the petitioner by said

amendments, and, therefore, that while petitioner is operating its hog business at a loss, it would be unable to recover the tax paid to the defendant, although, as stated, it is unable to pass such tax.

The only way, therefore, that your petitioner's rights can be safeguarded in the event said Act, as it appertains to the petitioner, is held finally invalid, is to enjoin the defendant from taking any steps to collect said tax from the petitioner, and, for the purpose of safeguarding the interests of the defendant, to cause the petitioner to give adequate bond by a responsible surety company to protect the defendant and to assure him of the collection of the tax in the event the appeal herein is decided adversely to your petitioner.

To adjudicate petitioner's rights in said appeal and to determine whether the Court below erred in dissolving the temporary injunction, it will be necessary for your Honorable Court to determine the validity of said Act as it appertains to the petitioner and, if said Act is invalid, whether or not unusual and extraordinary circumstances are presented by the petitioner, and whether any act transpired justifying the Court below to dissolve the temporary injunction heretofore granted by it to your petitioner after hearing duly had.

XIII.

Petitioner states that under the Act, as amended, it wil be faced with the necessity of proving the tax paid and whether any portion thereof has been passed on, and, at that time, your petitioner states that taxes, as a separate item, form no consideration in any price the petitioner asks or sells its hog products for, the price being

governed solely by market conditions, supply and demand, appertaining to the various commodities into which hogs are converted through manufacturing. Thus, in relation to each month, petitioner would have to present and show the disposal of each hog into converted product, the date of sale of each item of product of each hog handled by it, the market fluctuations appertaining—the market at the beginning of the manufacture; the market at time of sale; what part of any of the price subsequently obtained for each commodity represented profits appertaining to manufacture ,profits appertaining to rise in market value of the commodity, and generally proof of this nature, which will be solely and directly limited to each taxable period of one month each and require this proof as to each taxable period, and, in fact, as to each hog.

The Act provides for a copy of the proceedings held before the Commissioner of Internal Revenue to be filed in the Court in the event petitioner is dissatisfied with any determination of the commissioner. Grave doubt appears upon the face of the amendments, petitioner respectfully shows, as to whether or not petitioner would have right of recovery in the event any part of the processing tax might have been passed on. Thereafter, pursuant to the Act, petitioner must bring an action, file the transcript of the proceedings, which would be voluminous and costly, and present the matter before the Court as to each taxable period, again in a costly, voluminous and expensive manner, and would, in effect, be faced, in case the relief prayed for herein is denied, with a great multitude of presentations of its claims and rightful redress, and would, likewise, be engaged, in effect, in a great multiplicity of actions before the Courts of the United States as to

each taxable period and as to each hog converted into various products during each taxable period.

XIV.

Your petitioner, for the purpose of obtaining injunctive relief before the Court below, put up surety bond in the amount of 115% of the tax to protect the Collector of Internal Revenue; that such bond, so calculated as to any of the taxes that may be assessed or levied against the petitioner during the pendency of any proceeding prior to the final determination of the validity of the Act, would be ample to protect the defendant as to all taxes that may be due from petitioner in the event the appeal herein is determined against it.

XV.

In a suit heretofore determined by the United States Circuit Court of Appeals for the First Circuit, it has been held that the Act aforesaid is unconstitutional, and unconstitutional in the particulars wherein it would affect this petitioner, and this decision has been taken to the United States Supreme Court upon a writ of *certiorari* and is now pending in that Court.

The facts stated in plaintiff's complaint attached hereto and marked "Exhibit A", as aforesaid, and plaintiff's supplemental complaint, marked "Exhibit C", as modified by the allegations in this petition contained, are true at this time, and for the purpose of this petition, in all of such particulars are to be deemed the allegations of this petitioner. Your petitioner offers to give surety bond in requisite amounts to protect the defendant herein during the pendency of the appeal.

XVI.

After the decision of your Honorable Court in the cause aforesaid, on or about the 15th day of August, 1935, upon motion of defendant that such decision constituted a binding direction to the District Courts of the United States in this Circuit, irrespective of the facts and circumstances involved, and, likewise, upon presentation by the defendant to the Court of the amendment to the Act aforesaid, which motion was made on August 22, 1935, said Court on the 30th day of August, 1935, dissolved the injunction granted, as aforesaid, on the 8th day of August, 1935.

Thereupon, on the 30th day of August, 1935, said District Court held that it was bound by the decision of your Honorable Court, so made on the 15th day of August, 1935, and dissolved the temporary injunction heretofore granted to your petitioner.

Your petitioner thereupon moved for a rehearing of the order dissolving the temporary injunction, and on the 12th day of September, 1935, said Court refused to set aside the order made on August 30, 1935, of which a copy is hereto attached, marked "Exhibit D", and, by such reference made a part hereof.

That true and correct copies of all papers and documents filed in said cause, except the praecipe, appeal bond, and citation on appeal are attached to and made a part of this petition.

Thereupon, this petitioner, pursuant to law, made and perfected its appeal from the order of Court dissolving said temporary injunction. A copy of the order of the Court allowing said appeal is attached to this petition marked "Exhibit E", and made a part hereof.

XVII.

Petitioner states that in its petition to the District Court for an order allowing an appeal from said order vacating the temporary injunction, petitioner requested the said court to issue an injunction pending appeal from said Court. That said District Court held upon such application that in view of the recent action of the Circuit Court of Appeals for the Ninth Circuit with reference to injunctions pending appeal in other causes involving processing taxes under the Agricultural Adjustment Act that petitioner's application for such injunction should be presented to the United States Circuit Court of Appeals for the Ninth Circuit. A copy of the Court's order with reference thereto is attached hereto, marked "Exhibit E" and made a part hereof.

Wherefore, petitioner, believing that it is justly entitled to restoration of temporary injunction which was vacated by the order from which the appeal herein is taken, and that pending such appeal, a supersedeas should be issued by this Honorable Court which would, in effect, restore the said temporary injunction, petitioner prays for an injunction pending appeal herein from the said order of August 30, 1935 which vacated said temporary injunction.

ARMOUR & COMPANY, a corporation,
Petitioner.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER,
By J. C. MACFARLAND,
Its Solicitors.

IRA C. POWERS,
Of Counsel.

State of California, County of Los Angeles—ss.

G. M. Cockle, being first duly sworn, deposes and says: That he is vice-president of Armour & Company, the plaintiff in the above entitled action; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

G. M. Cockle,

Subscribed and sworn to before me this ..... day of September, 1935.

.....

Notary Public in and for the County of Los Angeles, State of California.

[Exhibit A.]

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

* * * *

ARMOUR & COMPANY, a corporation, Plaintiff, v. NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 740-C In Equity BILL OF COMPLAINT AND PETITION FOR INJUNCTION

* * * *

The plaintiff, Armour & Company, a corporation, brings this, its bill of complaint, against the defendant, Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, and for grounds of complaint the plaintiff says:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and has its principal office and place of business in the City of Chicago, State of Illinois; that also it is qualified to do business in the State of California and has an office and place of business in the City of Los Angeles,

State of California, within the said Sixth Collection District of California and within the Southern Judicial District of the State of California.

II.

That the defendant, Nat Rogan, is the duly appointed, qualified, and acting Collector of Internal Revenue for the said Sixth Collection District of California and is a citizen of the United States of America and of the State of California and resides in the City of Los Angeles, County of Los Angeles, State of California and in the Sixth Collection District of California and in the Southern Judicial District of California.

III.

That this is a suit of a civil nature arising under the constitution and laws of the United States of America, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00).

IV.

That the plaintiff is, and has been since its organization, engaged in the business of slaughtering animals, including hogs, and packing and selling meat products, and that plaintiff owns and operates slaughtering houses and packing plants in the State of New Jersey and leases and operates a slaughtering house and packing plant in the City of Los Angeles, State of California, and in other cities; that the meat products manufactured and produced by the plaintiff, including those from the processing of hogs, are sold and dealt in by it in foreign, intrastate, and interstate commerce; that the slaughtering and processing of hogs is a business of intrastate character exclusively, being performed in its entirety within the limits

of the states wherein the plaintiff's plants are respectively established and operated.

V.

That there was adopted by the 73rd Congress and approved, May 12th, 1933, an Act, P. L. No. 10, popularly known as the "Agricultural Adjustment Act", but officially entitled:

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes."

and that said Act, for convenience hereinafter, will be referred to by its popular title, namely, the Agricultural Adjustment Act.

VI.

That the policy, to be effectuated by the enactment of said Act, was declared, by Congress, in Section 2, to be:

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the pre-war period, August 1900-July 1914. In the case of tobacco, the base period shall be the post-war period, August 1919-July, 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period, August 1909-July 1914."

That in pursuance of and for the purpose of effectuating the declared policy, the Act established as its dominant and essential feature a scheme whereby the Secretary of Agriculture was given extensive powers to reduce and control agricultural production, and thereby enhance agricultural prices, which scheme is in substance as follows:

(1) The Secretary of Agriculture was empowered by Section 8 (1) to provide for reduction in the acregage or in the production for market, or both, of any of the enumerated agricultural commodities, which were designated as basic, through agreements with producers or by other voluntary methods;

(2) By the same section, the Secretary was empowered to provide for rental or benefit payments in connection with such agreement, that is, to make rental or benefit payments to the producers who sign such agreements to reduce acreage or production, "in such amounts as the Secretary deems fair and reasonable";

(3) By Section 9 the Secretary was empowered, whenever he determined that rental or benefit payments should be made with respect to any basic agricultural commodity,

so to proclaim and thereby put into effect from and after the beginning of the marketing year for the commodity next following such proclamation, a so-called processing tax levied upon and collectible from the processors of such commodity on account of the first domestic processing of such commodity.

(4) By Section 9 the Secretary was empowered to determine and fix the rate of the processing tax, but it was provided that the tax should be at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity", which is defined to be the "price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the based period," i. e., August, 1909 to July, 1914. But, if the Secretary should find that the tax at such rate would cause such a reduction in the quantity of the commodity or products thereof, domestically consumed, as to result in the accumulation of surplus stocks of the commodity or products thereof, or in the depression of the farm price of the commodity, then the processing tax should be at such rate as would prevent such accumulation of surplus stocks and depression of the farm price of the commodity.

(5) By Section 9 the Secretary was empowered to determine when rental or benefit payments and the processing tax in respect to a basic agricultural commodity should terminate.

(6) By Section 11, hogs, among other commodities, were included in the expression "basic agricultural commodity," and the Secretary of Agriculture is given power to exclude any such commodity from the operation of the statute if he finds, after notice and hearing, that the

policy of said Act, with respect to such commodity can not be carried out because of conditions of marketing production or consumption, thereby giving to said Secretary power to establish a price differential in favor of commodities which compete with pork products.

(7) By Section 12 the proceeds from the processing taxes were appropriated in advance for the payment of rental and benefit payments, the cost of administering the Act, refunds of processing taxes and for certain other general purposes of the Act, and no other appropriation for the rental of benefit payments has ever been made by the Congress.

VII.

That Section 9, paragraphs (a), (b), and (c) of said Act provide, in part, as follows:

"(a) * * * When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary pro-

claims that rental or benefit payments are to be discontinued with respect to such commodity."

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that any such result will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stock and depression of the farm price of the commodity."

"(c) * * * * the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in Section 2 (August 1909-July 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

VIII.

That, in addition to the above enumerated powers, which constitute the chief plan and design of the Act, there were vested in the Secretary of Agriculture by the Act certain incidental powers, to wit:

(1) The power to enter into marketing agreements with processors, association of producers, and others engaged in the handling in the current of interstate or foreign commerce of any agricultural commodity or product thereof;

(2) The power to issue licenses permitting processors, associations of producers and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or products thereof, to fix, within certain broad limits, the terms and conditions of such license and to revoke or suspend any such license for violation of the terms or conditions thereof.

(3) To make, with the approval of the President, regulations to carry out the powers vested in the Secretary by the Act and to fix the penalty for the violation of any such regulation not exceeding $100 in amount.

IX.

That, by virtue of the supposed authority conferred upon him by the said Act, the Secretary of Agriculture has made the following determination and orders in regard to hogs, one of the basic agricultural products named in the Act, viz:

(1) A proclamation, as of August 17th, 1933, that benefit payments were to be made with respect to hogs.

(2) A determination from statistics of the Department of Agriculture, that the difference as of Nov. 5th, 1933,

between the current farm price of hogs and the fair exchange value was $4.21 per cwt. live weight.

(3) A determination, after a hearing held in Washington on Sept. 5th, 1933, that the imposition of a processing tax of $4.21 per cwt. live weight would result in an accumulation of surplus stocks of hogs, or the products thereof, or the depression of the farm price of hogs, and that the following rates of the processing tax would prevent such results:

50¢ per cwt. live weight, effective as of Nov. 5th, 1933;

$1.00 per cwt. live weight, effective as of Dec. 1st, 1933;

$1.50 per cwt. live weight, effective as of Jan. 1st, 1934; and

$2.00 per cwt. live weight, effective as of Feb. 1st, 1934.

(4) A determination as of Dec. 1st, 1933, that adjustment of the rate of the tax was necessary and that as of Jan. 1st, 1934, the tax should be $1.00; as of Feb. 1st, 1934, $1.50; and, as of March 1st, 1934, $2.25 per 100 lbs. live weight, which rates, according to the Secretary, would prevent the accumulation of surplus stocks and the depression of the farm price of hogs.

X.

That, as a result of these determinations and orders, a processing tax in respect to hogs became effective Nov. 5th, 1933, and has continued and is now in effect and that the rate of said tax for each cwt. live weight has been, from time to time, as follows:

50¢ from Nov. 5th, 1933 to Dec. 1st, 1933.

$1.00 from Dec. 1st, 1933 to Feb. 1st, 1934.

$1.50 from Feb. 1st to March 1st, 1934.

$2.25 from March 1st, 1934 to the present time, and such rate is now in effect.

That plaintiff is informed and believes and therefore, upon such information and belief, charges the fact to be that the Department of Agriculture has to date collected over $866,000,000 in all processing taxes and has disbursed the same amount pursuant to the terms of said Act and that future processing taxes intended to be collected and disbursed will amount to over $360,000,000 per annum.

XI.

That, under the supposed authority of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and collected by the defendant from, the plaintiff a processing tax at the rate prevailing at the time of collection on all hogs slaughtered by plaintiff at the plant operated by it as lessee in the City of Los Angeles, State of California, since January 19, 1935, and that the amounts of such tax assessed against and collected from the plaintiff by months on all hogs so slaughtered by it (a calendar month being the period for which the tax must be returned and paid) are as follows:

Month	Year	Total
January	1935	$11,048.69
February	1935	19,477.48
March	1935	17,362.28
April	1935	18,507.91
May	1935	21,624.35
		$88,020.71

XII.

That under the terms of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and there is now claimed to be due from the plaintiff processing tax for the month of June, 1935, in the amount of $15,789.69 on account of hogs slaughtered by the plaintiff at the said plant operated by it as lessee in the City of Los Angeles, State of California; that the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, is charged with the duty of collecting said tax; that under applicable statutes and regulations of the Treasury Department, if the plaintiff does not make the said payment, the said Collector will serve upon the plaintiff notice and demand, and plaintiff will be allowed ten days from the receipt of such notice and demand within which to pay said tax and in the event of failure to pay within said time, defendant will assert against plaintiff a penalty equal to five per centum of the amount of the tax and interest on the tax at the rate of one per centum a month from the due date of the tax until it is paid; and that in the event plaintiff fails to pay said tax within ten days after receipt of said notice and demand defendant will proceed to collect the tax, penalty and interest by filing a notice of lien upon all of plaintiff's property and distraining upon and selling such of plaintiff's property as may be necessary in order to realize the amount of said tax, penalty and interest; that additional processing tax for months subsequent to June, 1935, will accrue and will be assessed against and collected from plaintiff, just as the processing tax for the month of June will be, in the manner described, unless the defendant is restrained and enjoined from asserting and collecting said taxes.

XIII.

That there are now pending before the Congress certain amendments to said Act, some of which have been adopted and passed by the House of Representatives and others of which have been adopted and passed by the Senate; that the purpose and effect of said amendments was explained in the report (No. 1011, to accompany H. R. 8492) of Mr. Smith for the Committee on Agriculture and Forestry, to be, among other things, a withdrawal by the United States of the right of a taxpayer to sue for refund in the event that said Act be declared unconstitutional, on the assumption that the tax has been passed on to the consumer, said report being quoted in part in Exhibit A hereto.

XIV.

That the theory and effect of said Act, in particulars here relevant, are explained in official publications issued by the Department of Agriculture, Agricultural Adjustment Administration, attached as Exhibit B hereto, wherein it is stated that "Who pays the processing tax depends on the supply and demand conditions for a given commodity" and that, under varying conditions the tax is borne by producer, processor and consumer, in varying and fluctuating amounts.

XV.

That the plaintiff is not able to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture and also the existing processing tax of $2.25 for each 100 pounds live weight of hogs purchased by it; that more than fifty (50) separate and distinct products result from the processing of a hog, all of which products are sold by the plaintiff; that, because of the

nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for the plaintiff or for any one else to ascertain what portion of the processing tax, payable because of the processing of any 100 pounds live weight of any hogh, is assignable to the products resulting from such processing, in that in the normal course of business of the plaintiff, a hog is purchased on a given day, is processed the same or the next day and the products are sold as individual pieces from ten days to four months later, during which time the market prices at which such products are sold have been constantly and daily fluctuating; that said processing taxes paid and to become due and payable by plaintiff under said Act cannot be recovered or recouped by it as a result either of adding said tax to the product or of subtracting the said tax from the price paid to the raisers of hogs, for the reason that hogs are bought and pork products are sold in competitive markets; that the price at which pork products can be sold in the market is determined, not only by competition from other packers, but also by competition which other food products give pork, by consumer demand and by the price which the consumer will pay.

XVI.

That the supposed standard or formula established by said Act as a supposed guide to the Secretary of Agriculture is, in fact, non-existent and a mere mental concept subject to unlimited variation by arbitrary selections of articles and grades or averages of grades of articles which undisclosed individuals think farmers buy, and of grades and weights or averages thereof of articles taxes; of markets in which said articles and grades are dealt; by choice between high, low and average prices for days,

weeks, months, or averages thereof; and by a purely arbitrary determination by collectors of statistics as to whether or not any price or all prices should be weighted for volume of trade.

That said processing taxes are not taxes in any constitutional sense but are merely a means and devise whereby the intrastate production of products resulting from processing may be controlled, limited and increased at will by the Secretary of Agriculture; that numerous suits have been instituted by competitors of plaintiff and numerous injunctions have been issued by other courts protecting said competitors against assessment and collection of such processing taxes and if plaintiff be not granted similar relief, it will be at a disadvantage, competitively, in conducting its business; that the plaintiff's losses from the processing of hogs have been directly increased as a result of the effect of said processing taxes and that the plaintiff is no longer justified in acquiescing, by the payment of said taxes in the expectation of refunds, in experiments with its capital.

XVII.

That the said Agricultural Adjustment Act, and the provisions thereof for the levy of the processing taxes, is unconstitutional and void for the following reasons:

(1) The said Act enacted a scheme designed to regulate and control the production of hogs, corn, cotton and certain other agricultural commodities specified in the Act, and the so-called processing taxes imposed by the Act are an integral part of the scheme of regulating and controlling the production of such commodities. The regulation and control of the production of such commodities is not within the scope of any of the powers vested in the Congress by the Constitution, and is, therefore, within the

powers reserved to the States as expressly provided by the 10th Amendment to the Constitution;

(2) The so-called processing taxes were not imposed under or in conformity with the power vested in the Congress by Section 8, Article 1 of the Constitution to levy and collect taxes, duties, imposts and excises in that they were not imposed to pay the debts or to provide for the common defense or the general welfare of the United States, but were imposed for the benefit of a particular class of individuals, namely, the producers of the various specified agricultural commodities who conform to the conditions laid down in the Act;

(3) Said Act violates the 5th Amendment to the Constitution since the so-called processing taxes constitute the deprivation of the property of one class of citizens, namely, the processors of the specified commodities, without due process of law, in that such processing taxes constitute the taking of the property of this class of citizen, not for a public purpose but for a private purpose, to-wit, the payment of gratuities or bounties to another class of person, namely, the producers of the designated agricultural commodity, and particularly since this taking is without just compensation.

(4) Said so-called processing taxes levied under the Act are taxes only in name and not in fact. They constitute merely an exaction or imposition by Government for the purpose, not of raising revenue for support of the government, but of raising prices for farm products and adjusting farm income.

(5) Said Act further violates the Constitution since it makes a delegation of legislative power to the Secretary of Agriculture without the fixing of clear and adequate standards, in the following particulars:

Congress has illegally delegated to the Secretary of Agriculture the power to initiate the tax, to determine the commodities taxed, to terminate the tax, to fix the tax rate, to fix the amount of rental and benefit payments, to expend the proceeds of the tax; and that Congress has otherwise illegally delegated its authority, and the exercise of such power by the Secretary of Agriculture conflicts with the separation of powers into the three departments of government made by the Constitution.

(6) Said act delegates to an administrative officer legislative powers conferred exclusively on Congress by Article 1, Section 1; Article 1, Section 8, Clause 18; Article 11, Section 1; Article 1, Section 7, Clause 1; and Article 1, Section 9, Clause 7 of the Constitution of the United States, by giving said Secretary the right (1) to select the basic agricultural commodities to be taxed; (2) to fix the rate and change the rate of said tax (3) to determine the duration of same; (4) to make exceptions and exclusions from the operation of said tax, and (5) for other reasons.

(7) The power of said Secretary to pay out the proceeds of said taxes without any appropriation by Congress violates Article 1, Section 9, Clause 7, of the U. S. Constitution and the Fifth Amendment thereto, because no basis of fact or specific findings are required to be found by said Secretary to impose the said tax and no judicial review is provided.

(8) The said taxes, if constructed as directed, violate Article 1, Section 9, Clause 4, and Article 1, Section 2, Clause 3 of the Constitution of the United States, because not apportioned according to population.

(9) The said taxes are not excise taxes and are not uniform through the United States, as required by Article 1, Section 8, Clause 1.

(10) The said alleged taxes cannot be levied under Article 1, Section 8, Clause 3, regulating commerce; that the production of commodities is not interstate commerce and cannot be regulated by Congress.

XVIII.

That on June 18, 1935, there was passed by the House of Representatives of the United States a Bill (H. R. 8492) entitled "A Bill to Amend the Agricultural Adjustment Act, and for other purposes," containing a provision adding to the Agricultural Adjustment Act a new section designated "Section 21," the relevant portions of which read as follows:

"Sec. 21. (a) No suit or proceeding shall be brought or maintained in, nor shall any judgment or decree be entered by, any court for the recoupment, set-off, refund, or credit of, or on any counterclaim for, any amount of any tax assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment. Except pursuant to a final judgment or decree entered prior to the date of the adoption of this amendment, no recoupment, set-off, refund, or credit of, or counterclaim for, any amount of any tax, interest, or penalty assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment shall be made or allowed. The provisions of this subsection shall not apply to (1) any overpayment of tax which results from an error in the computation of the tax, or (2) duplicate payments of any tax, or (3) any refund or credit under subsection (a) or (c) of section 15 or under section 17.

(b) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claims pursuant to the provisions of law made applicable by section 19 may be reserved in the court's order."

That said Bill was sent to the Senate of the United States, where the said Section 21 was altered and modified to read as follows:

"No recovery, recoupment, setoff, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue, or in the case of a judicial proceeding establishes in such proceeding (1) that he has not included such amount

in the price of the article with respect to which it was imposed, or of any article processed from the commodity with respect to which it was imposed, that he has not collected from the vendee any part of such amount, and that the price paid to the producer was not reduced by any part of such amount, or (2) that he has repaid such amount to the ultimate purchaser of the article, or in case the price paid to the producer was reduced by such amount, to such producer; nor shall any judgment or decree be entered by any Federal or State court for damages for the collection thereof, unless the claimant establishes the foregoing facts, in (1) or (2) as the case may be, in addition to all other facts required to be established. * * * * * "

XIX.

That, in the event that the said Bill amending the Agricultural Adjustment Act, as set forth above, is in either form enacted by Congress and becomes a law, the plaintiff will have no adequate remedy at law to sue for the refund or processing taxes or to litigate before this court or any other tribunal the question of the legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of processing taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them, in that said Senate modification imposes onerous conditions which cannot be complied with because the facts are incapable of ascertainment; that the purported right to sue for a refund for the amount of tax not passed on is purely illusory in that an error in computation of one (1) cent in the amount claimed will result in the loss and forfeiture of

the entire amount, even though said amount be several million dollars; that the prices of hogs processed by plaintiff and of the products dealt in by plaintiff are set by competition, in open and free markets, said prices fluctuating daily and in some cases hourly and the ascertainment of the part of any processing tax not passed back to the producer or on to the consumer is an impossibility.

XX.

That there is now pending before Congress H. J. Res. 348, section 2 of which provides:

"Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever heretofore or hereafter commenced, upon any bond, note, certificate or indebtedness, Treasury Bill, or other similar obligation for the repayment of money or for interest thereon made, issued, or guaranteed by the United States or upon any coin or currency of the United States or upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver, is withdrawn."

Thus if said joint resolution be passed subsequent to the enactment of any amendment to said Act purporting to reserve to a taxpayer the right to sue for a refund, the plaintiff asserts that, because of the broad language used in said joint resolution, it may be construed to withdraw any such right, in which event, the plaintiff will be remediless if said joint resolution be constitutional.

XXI.

That the amount of processing tax payable by plaintiff on account of hogs slaughtered at its said Los Angeles plant for the month of June, 1935 is $15,789.69, and that plaintiff shortly will receive from the defendant a demand in writing that plaintiff pay said amount to defendant; that if such amount be not paid, said statute provides that a penalty of five per cent (5%) be added to said amount and that interest be added at the rate of one per cent (1%) per month thereafter; that plaintiff can not incur the risk of non-compliance with said demand, in the absence of injunctive relief, because, in addition to imposing said penalties and interest, defendant will attach, distrain, or levy on the property of plaintiff, thereby irreparably injuring its business, good-will, and credit, and subjecting it to a multiplicity of suits; and plaintiff believes and therefore states that processing taxes for the month of July, 1935, and thereafter will exceed the sum of ten thousand dollars ($10,000.00) per month.

That, if plaintiff fails to pay said processing taxes when due, it and its officers will be subject to heavy criminal penalties as provided in Section 1114 (a) of the Revenue Act of 1926 (44 Stat. 116; U. S. C. Title 26, Sec. 1265) and Section 19 (g) of said Agricultural Adjustment Act as amended, unless protected thereon by the injunctive process of this Court.

XXII.

That, aside from the invalidity of the said Act, the processing taxes which have been assessed and collected since January 19, 1935, were and the processing tax which is now being asserted against the plaintiff is, erroneous and illegal in that the rate of the tax since January 19,

1935, has not conformed and does not now conform to the alleged standard or formula which Congress laid down in the Act for the determination of the rate and that such rate exceeds the lawful rate which should be applied in accordance with said alleged standard or formula; that in said Act it is provided that the rate of the processing tax shall equal the difference between the current farm price for the commodity and the fair exchange value of the commodity and that the Secretary of Agriculture shall adjust the rate from time to time to conform to such alleged standard or formula; that the prevailing rate of the processing tax, to-wit: $2.25 per cwt, now exceeds and has exceeded since January 19, 1935, the difference between the current farm price and the fair exchange value as calculated from statistics compiled by the Department of Agriculture; that the alleged fair exchange value of hogs, the alleged current farm price for hogs, and the excess of the alleged fair exchange value over the alleged current farm price as so calculated are as follows:

1935	Alleged Fair Exchange Value or Pre-war Parity Farm Price for Hogs	Alleged Farm Price for Hogs	Excess of Pre-war Parity of Alleged Farm Prices Over Alleged Actual Prices
January	$9.10	$6.87	$2.23
February	9.17	7.10	2.07
March	9.17	8.10	1.07
April	9.17	7.88	1.29
May	9.17	7.92	1.25
June	9.17	8.36	0.81

and that the defendant will continue to collect the processing tax at the illegal rate of $2.25 per cwt. from plaintiff under threat of distraint of plaintiff's property unless he is enjoined therefrom by this Court.

XXIII.

The plaintiff is ready, able and willing, and hereby offers and agrees that in the event the injunctive relief herein prayed for is granted, it will deposit, at such time and in such manner as this Court shall direct, the said sums claimed to be due from the plaintiff for processing taxes assessed against it for the month of June, 1935, and the plaintiff further offers and agrees that at the end of each month hereafter it will file processing tax returns with the defendant as required by existing laws and regulations and that as and when processing taxes under said returns become due and payable according to existing laws and regulations or any extension lawfully granted to the plaintiff, it will deposit the amount of such taxes in such manner as the Court may direct, all such deposits to abide the final decree of this cause.

WHEREFORE, plaintiff being without a plain, certain and adequate remedy at law and being able to obtain relief only in a court of equity, prays:

(1) That a writ of subpeona be issued to the defendant requiring him to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived;

(2) That a temporary, as well as preliminary, injunction be issued and granted by the said Court to the plaintiff against the defendant, after notice and hearing if

required by said Court, enjoining the defendant until the final hearing of this cause or until further order of this Court from collecting or attempting in any manner to collect from the plaintiff, whether by lien or notice of lien or jeopardy or other assessment, any processing taxes under or pursuant to the said Agricultural Adjustment Act, and any interest or penalty on account of plaintiff's failure to pay any such processing tax; from levying upon or distraining, or in any way, interfering with the manufacturing plant, inventory, cash on hand, bank account or other property of the plaintiff on account of the nonpayment of said processing taxes now due or hereafter to become due in accordance with the terms and provisions of the said Agricultural Adjustment Act; and from hereafter enforcing or collecting or attempting to enforce or collect any penalties against the plaintiff for the nonpayment of said taxes from the date of the issuance of the said temporary injunction until the final decree of this Court in this cause;

(3) That, on the final hearing of this cause, the said Agricultural Act entitled

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes"

and the Acts amendatory thereof, and supplemental thereto, be declared unconstitutional and void as violative of the Constitution of the United States and that the defendant be permanently enjoined and restrained from

enforcing the same and from collecting or attempting in any manner to collect processing taxes or penalties against the plaintiff pursuant to the terms of said Act;

(4) And the plaintiff prays for all other relief agreeable to equity and good conscience.

GIBSON, DUNN & CRUTCHER,

By: J. C. MacFarland

Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

G. M. COCKLE being by me first duly sworn, deposes and says: that he is the Vice-President of ARMOUR & COMPANY, the plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint and Petition for Injunction and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

G. M. COCKLE

Subscribed and sworn to before
me this 2nd day of August, 1935.

Mary S. Alexander (Seal)
Notary Public in and for the County
of Los Angeles, State of California.

EXHIBIT A.

REPORT NO. 1011.

"The sections of the bill which deal with the imposition of processing taxes have been altered in several important particulars. These taxes, while levied upon processors, have been passed on to the consumer and actually paid by him. Consequently it has been found desirable to guard against the possibility of recovery of taxes accrued to or paid by the processors prior to the date of the adoption of these amendments, should such taxes for any reason be held invalid, by withdrawing the consent of the United States to be sued, and withdrawing jurisdiction from all courts to entertain such suits. * * *

The declaration of policy in the Agricultural Adjustment Act has as its objectives the reestablishment of prices paid to farmers at a level that will give agricultural commodities a current purchasing power equivalent to that of the base period. Section 1 (a) of the bill amends this provision of the act to provide that in the case of all commodities for which the base period is the pre-war period (August 1909 to July 1914), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This provision is intended to give the Agricultural Adjustment Administration a more adequate standard for determining parity prices. The present method of calculation is composed of an index of prices

for goods which farmers buy in relation to the pre-war level and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160 to 170 per cent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers, may be expected to give parity standards approximately 5 percent higher than at present * * * *

"Before exercising any of the powers granted with respect to any commodity, the Secretary must determine that the current average farm price of the commodity is, at the time of such determination, below the fair exchange value thereof, or that the average farm price of the commodity for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, is likely to be less than its fair exchange value. The Secretary must undertake an investigation concerning the existence of these circumstances whenever he has reason to believe that they exist. If he finds, upon the basis of the investigation, that they do exist, he is directed to undertake the exercise of such of the powers conferred by section 8 as are administratively practicable and best calculated to effectuate the declared policy The Secretary is directed to cease exercising such powers after the end of the marketing year when he determines, after investigation, that the circumstances described above no longer exist, except (as provided in the committee amendment) insofar as the exercise of any of such powers is necessary to carry out obligations as-

sumed by him prior to his proclamation discontinuing the exercise of the powers * * * *

"Section 9 (b) of the present law also contains a provision allowing the Secretary of Agriculture, when he finds that the effect of the tax is to cause such a reduction in domestic consumption as to cause an accumulation of surplus stocks of a commodity or its products, or a depression in the farm price, to set a rate which will prevent such consequences. Although it is clear that Congress intended to provide for such a reduction in the rate of tax even when the existing rate is higher or lower than the difference between the current average farm price and the fair exchange value, or in the event that these circumstances continued even after one such reduction, the langauge at present used does not explicitly state that such adjustments are permissible. The proposed amendment to section 9 (b) expressly authorizes reductions under these circumstances, and also empowers the Secretary to increase a rate of tax which has been theretofore reduced. An increase in rate is, of course, contingent upon the Secretary's finding that such increase will not cause a recurrence of stock accumulations or price depressions. After such a finding the processing tax is to be at the highest rate which will not cause such accumulation of stocks or depression in price, but it cannot be higher than the difference between the current average farm price and the fair exchange value."

EXHIBIT B.

(a) "Achieving a Balance Agriculture," issued August, 1934:

"CHAPTER VIII—PROCESSING TAXES; WHAT FOR AND WHO PAYS THEM?

"By the end of March, 1934, the Agricultural Adjustment Administration had disbursed a total of $179,702,-687. By the end of 1935 it anticipates a total disbursement of about $840,000,000.

"Where is the money coming from?

"The adjustment program is being financed largely by the receipts from processing taxes, collected by the Bureau of Internal Revenue from the first domestic processor of each of the basic commodities—the miller, the cotton textile manufacturer, the meat packer, and so on. As was mentioned in Chapter VI, in the consumer's interest the tax was limited by law to the amount necessary to raise the current farm price of the commodity to the 'parity' price.

"In some cases, where the application of the full amount of such tax would cut down consumption and therefore pile up new surpluses, the Secretary of Agriculture is permitted to fix the tax at a lower level. This has been done in connection with the corn-hog program.

"Since the prices of competing commodities largely determine how much of each will be bought, the Secretary also is allowed to place compensating taxes on commodities whose use is likely to replace that of commodities bearing a processing tax. Compensating taxes are now being levied on jute and paper where they come into competition with

cotton. Similar taxes are permitted on imported articles so as to maintain the usual competitive relationship between the use of imported and domestic goods.

"Who pays these taxes?

"Do the miller, the textile manufacturer, the packer, pay them?

"Do they pass them forward to the consumer?

"Or do they pass them back to the producer?

"SUPPLY AND DEMAND CONDITIONS GOVERN

"Who pays the processing tax depends on the supply and demand conditions for a given commodity.

"Demand for a product may be either elastic or inelastic. It is inelastic when about the same amount of the product is bought, no matter whether the price is high or low. It is elastic when a rise in price is immediately followed by a drop in quantity sold.

"When demand is inelastic, the processing tax is likely to be paid by the consumer, since he will continue to buy even if the whole tax is added to the price of the goods.

"When demand is elastic, on the other hand, the consumer may pay less than the full amount of the tax if the same quantity of the product is put upon the market as before. In such cases, the producer and the distributor each try to make the other absorb the tax; while supplies continue to be excessive, it it more likely to be passed back to the producer in the form of prices lower than they would be if shipments were smaller.

"Experience with the processing taxes seems so far to indicate that in the case of cotton goods and of wheat

flour the tax has been consistently paid by the consumer. That is partly because both are nonperishable commodities which can be stored and thus do not have to be thrown upon the market as soon as they are produced; partly because they are sold abroad as well as at home, which means that demand from abroad tends constantly to bolster the price at home with domestic prices almost always related to world prices; and partly because they are regarded by the public as necessities and hence domestic demand for them is highly inelastic.

"EFFECT OF TAX ON HOG PRICES

"In the case of hogs, on the other hand, the effect of the tax has been varied. Three distinct periods are noticeable between October 1933 and May 1934. Demand for pork is highly elastic. Consumers buy a great many pounds of pork products if prices are low, and correspondingly fewer pounds as prices rise, so that the annual amount spent on it by the public remains just about the same. In view of this, the processing tax has been applied gradually, beginning at 50 cents per hundred pounds live weight in November 1933 and rising to $2.25 in March, 1934.

"From October to January, the farmer was shipping a very large supply which the consumer would not have accepted had the prices been put up too much. Price-raising effects of the Administration's emergency hog-buying program, which eliminated over 6 million pigs and light hogs from the farms during the autumn, were not

felt during that period because those pigs, if left on the farm, would not have been sold until later. During those months, many farmers assumed that they themselves were paying part of the tax, but in no case has it ever been contended that they paid all of the tax. Such a situation is very different from the McNary-Haugen plan for raising prices, under which the farmer would have paid all of the cost of contributing the equalization fee.

"After January 1934, the elimination of the pigs began to be felt; the curtailed supply turned a buyers' market into a sellers' market, and from January to March the tax appeared to be generally paid by the consumer. Prices to farmers showed a distinct rise, from $3.06 per hundred pounds on January 15 to $3.88 on March 15.

"By the end of March, the supply situation began to reverse itself; as shipments increased, prices to farmers declined again, with a pronounced drop in price when an unusual number of shipments were forced on the market by the drought.

"Twice, during the days immediately following the raising of the tax on the first of February and on the first of March, the packers absorbed a part of the tax, for they were unable to raise wholesale prices of pork as fast as the price of hogs plus tax was going up. Thus during most of the period after processing taxes were levied, farmers received more than they did in the corresponding period a year before in price alone, and, in addition, they got their benefit payments.

"TAX MONEY ENDS UP IN FARMERS' POCKETS

"But, from one point of view, the question of who pays the tax is beside the point. Even if it could be shown that the farmer pays part of the tax, that would not in itself mean that the farmer is not gaining great advantage from it. If there were no tax, there could be no benefit payments. If there were no benefit payments, no plan for voluntary control of production would be feasible. If there were no control of production, supplies would be excessive and prices would continue at ruinously low levels.

"The farmer who thinks he is paying part of the tax should do some figuring. He should figure what price he would be getting if there were no adjustment program. Then he should figure what his total cost of production would be if he were making no reduction in the number of pigs raised, take that figure from his total income and thus get at his net return if he were not operating under the program. He should compare these figures with his situation under the adjustment program. He would find that three factors are contributing to his total income—his volume of production, his market price, and his benefit payment. He should subtract from this total income his cost of production, which will be less in proportion as his production is less. He can then see the difference between his net return under the program and what his net would be if there were no program.

"Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every

dollar collected in processing taxes goes to the farmer in benefit payments. In addition his market price is higher due to production adjustments. Except for money spent to remove surpluses from the market, the cash is sent straight to the farmers forming the county production control associations.

"What counts, after all, is not who pays the tax but who gets the income from it and who gets the advantage of the whole program.

"CONSUMERS' PRICE INFORMATION PUBLISHED

"Are the processing taxes ever paid more than once?

"Whenever any tax is levied there is always a danger that in the course of being passed on it may be piled up or pyramided, so that the ultimate consumer has to cover it several times. There is the possibility that retailers may reap excess profits under the excuse that the tax is forcing prices up.

"In order to prevent this and other abuses of the consumer in the case of processing taxes, a Consumers' Counsel has been established in the Agricultural Adjustment Administration. This office issues a semi-monthly bulletin called the Consumers' Guide, which follows price movements and the elements which make them up, so that the consumer may know just how much the tax really does add to the price he pays.

"The April 9, 1934, issue of the Consumers' Guide shows the part played by the processing taxes in prices of clothing, bread, and so on. According to the Consumers' Counsel's figures, the tax does not directly represent

more than one-half cent in the 7.9 cent average price of a one-pound loaf of bread. It does not directly represent more than 3.4 cents in the price of a woman's cotton dress, nor more than 6.2 cents in the price of a man's work pants. It does not directly represent more than 7.6 cents in the price of a sheet, 3.2 cents in that of a bath towel, or 1.3 cents in that of a yard of unbleached muslin. Further increases have been due to increased labor costs and other factors, but as these figures indicate, increases in prices directly due to the processing taxes alone are relatively small.

"SMALL PRICE RISE TO CONSUMER MEANS MUCH TO FARMER

"It is worth remembering that a small percentage rise in the consumer's price usually is accompanied by a much greater percentage rise in the farmer's price. This is because the farmer's share in retail price is usually very low and because costs of distribution usually remain about the same no matter what the price is. For example, if the consumer has been paying $1 for a bushel of potatoes, the farmer's share likely has been 35 cents. If the price paid by the consumer rises to $1.10, the farmer receives 45 cents instead of 35 cents. The increase in his price is 29 percent, while the consumer pays only 10 percent more. If the consumer pays $1.35 a bushel, the farmer will receive 70 cents, or double his former price, while the consumer's price has increased only 35 percent.

"Something like this is what happened during 1933 with respect to wheat. In March 1933, the consumer paid an average of 3 cents a pound for flour, of which the farmer got only 0.8 cent. In March 1934, the consumer

paid an average of 4.8 cents a pound, of which the farmer got 2.3 cents.

"A moderate decrease in the consumer's price may almost wipe out the farmer's margin, as it did in wheat early in 1933. Conversely, a moderate increase in what the consumer pays, such as occurred later in 1933, may change the farmer's prospects from ruin to a chance to make a reasonable living.

"PROGRAM DEPENDS UPON TAX

"From what has been said above, it will be clear to what extent the voluntary production control programs depend on the processing taxes. It will be seen that the tax has a double function: It not only supplies the funds which are being used to increase the co-operating farmers' income; it is the essential instrument by which production control is secured.

"In a sense, the processing tax and benefit payment may be considered the farmer's tariff, calculated to place him on more equal footing with the protected industrialist producing goods bought by farmers. Because large portions of our farm crops are ordinarily sold at world prices, import duties give little protection to the producers of these crops. As long as the United States maintains a high tariff protecting the prices of many industrial products which the farmer has to buy, the processing tax is needed to give an equal protection to the prices of the farm products which the farmer sells.

"Farmers who understand the manner in which the processing tax operates will be reluctant to abandon so practical and effective a means of gaining economic equality."

(b) "Corn-Hog Adjustment," issued January, 1935:

"INCIDENCE—WHO PAYS THE PROCESSING TAX?

"The processing tax may affect producers' income from corn and hogs in two general ways. Collection of the tax may operate to increase producers' income directly: (1) By causing consumers to pay more for the volume of products offered—possibly to the full extent of the tax rate—than they would pay if no tax were in effect; or (2) by causing processors and other in-between handlers to reduce to some extent the unit margins held out of the consumers' dollar for each pound or bushel of commodity handled. If either effect were produced the processing tax would tend to increase return from the commodity before any adjustment in production was made.

"Or collection of the processing tax may affect producers' income indirectly. Funds derived from the tax collections are used to provide benefit payments to producers who participate in adjustment of production. Under the adjustment program, supply is brought into better balance with effective demand and the value of the commodity tends to rise. Rising commodity values mean increased return to farmers. Although production adjustment itself is directly responsible for the increase in farmers' income in this case, the processing tax may be given credit indirectly because it provides the funds for the benefit payments. Without the benefit payments or some similar means of rewarding cooperating producers, there would not be general voluntary participation in the corn-hog programs.

"It is not easy to make a thorough and accurate analysis of the actual effects of the processing tax to date on consumers' expenditures, handlers' margins, or return to producers, particularly with respect to hogs, because of day-to-day and week-to-week variations in hog marketing, changing trends in consumers' incomes and fluctuations in other factors affecting market value of farm commodities. It is easy to be misled by changes in the market value of corn and hogs, which are due to other things than the collection of the processing tax.

"For example, a seasonal increase in hog marketings such as normally occurs in the early winter and late spring usually results in a proportionate decline in hog prices. If a processing tax were put into effect at such a time—as was the case with Hogs in November 1933—it could be rather persuasively argued that the tax had been responsible for the decline and that, therefore, producers were being made to "pay" the tax. This, however, might not be true. In spite of a temporarily lower price, the total money being paid by packers—the price for hogs and the tax on the right to slaughter—actually might be larger than normal with respect to the increased volume of hog marketings, and the cooperating farmer would receive the market price plus the benefit payments paid out of the proceeds of taxes.

"On the other hand, the opposite impression would result if a processing tax were put into effect during a seasonal decline in hog marketings, such as normally occurs in the early spring and late summer and which usually results in considerably stronger hog prices. That is, it would seem to show that the consumer was being made to spend more in total for hog products than before

and in effect, therefore, was being made to bear a part or all of the tax. However, this, too, might not actually be true in all respects.

"EFFECT OF PROCESSING TAX UPON PRODUCERS.

"How does the hog processing tax affect producers?

"Studies thus far indicate that the production adjustment program, the benefit payments, and the processing tax are resulting in substantially higher hog prices and in a larger total income. The increase thus far primarily reflects the adjustment in production effectuated by the emergency and supplemental purchase of hogs and hog products during the latter part of 1933 and early 1934. The 1934 corn-hog production adjustment program has only recently begun to affect hog marketings.

"It is sometimes argued that the producer pays the tax because he no longer gets, in the form of an open market price, all of the total amount paid by the processor for each hog slaughtered. This statement, however, has no real significance so long as the combined income from both the open-market price and the benefit payment is larger than before. To say that the producer pays the processing tax when farm income has been increased by a program financed by tax collections is to confuse the meaning of the word 'pay.'

"In a situation in which the producer paid the processing tax in the true sense, it would be found that the producers' total returns from the new production and sale of hogs would be less than if there were no adjustment-tax program and if no processing tax were in effect.

"Only the nonsigner who does not participate in the adjustment program can be said to sustain any disadvantage by reason of the processing tax. He does not share in the benefit payments made out of the proceeds of taxes. The nonsigner is benefited to some extent, however, by the rise in the open-market price which results from adjustment of production.

"What is the effect of the corn processing tax?

"The processing tax of 5 cents per bushel on field corn apparently is being absorbed largely by processors. The corn processing tax rate is nominal and applies only to the amount of corn processed in commercial and industrial channels. This amount is equal to about 10 percent of the annual corn crop.

"EFFECT OF THE PROCESSING TAX UPON CONSUMERS

"Does the consumer, in effect, pay the processing tax on hogs?

"This question should be divided into two questions if it is to be properly considered.

"Has production adjustment, which benefit payments have thus far encouraged, caused the usual increase in the retail price of pork and lard which in the past has resulted from a like change in supply? And, in addition, has the processing tax been handled by processors and distributors so as to cause a larger-than-usual increase in the retail price of pork and lard? That is, has the tax caused consumers to spend more for pork and lard than otherwise might have been spent for an identical adjusted supply on which no tax was in effect?

"Studies indicate that the adjustment in production under the Act has caused the retail price of pork and lard to increase to an extent which is about proportionate with the usual increase expected from a similar change in supply. After allowance for the increase in consumers' incomes during the past 2 years, studies show that the higher retail prices are fully reflecting smaller hog supplies and higher hog prices.

"It appears that consumers as a group are bearing the hog processing tax mainly in the sense that they are getting a more moderate supply of pork and lard for an expenditure which is proportionate with but not materially in excess of past total expenditures at a similar level of income. An individual consumer who is buying the same amount of hog products as formerly, of course, really is spending relatively more than before the adjustment in supply.

"The hog processing tax of $2.25 per hundredweight is the equivalent of an average of between 2½ cents and 6 cents per pound on the products from 100 pounds of live hogs, depending upon the cut and quality. The price equivalent of the hog processing tax represents a percentage of the total retail price on hog products that is larger than the percentage that the cotton and wheat processing taxes are, of the respective retail prices of wheat products and cotton goods. But this is because more in-between costs and margins enter into the processing and handling of wheat and cotton products than into the processing and handling of hog products. With respect to the open-market prices of the several unprocessed commodities, the wheat, cotton, and hog processing taxes all bear a similar relationship.

"EFFECT ON PROCESSORS AND OTHER HANDLERS

"Processors are the persons who actually pay the tax over to the Government out of the proceeds of their sales of products, but it is generally recognized that this does not necessarily mean that processors really bear the tax. If processors were paying the tax in the true sense, it would be found that their charges per hundred weight of hogs processed had been proportionately reduced with the imposition of the initial rate of the tax and with each increase thereafter. Thus at the present time, it would be found that processors' unit charges were smaller by an average of approximately $2.25 per hundredweight of live hog handled than before the tax was put into effect.

"A review of processors' gross margins since November 1933 indicates that while they have varied from month to month, these margins have widened to some extent with each increase in the tax rate. After the processing tax is subtracted from these gross margins, it appears that the average net margin on which the processor actually operates has tended to decline somewhat during the first marketing year the processing tax has been in effect. However, it cannot be definitely determined yet whether this is a temporary situation due to spirited bidding for hogs to put in storage in view of the short supply ahead or whether it is a more permanent result of the processing tax and other features of the agricultural adjustment program as it applies to corn and hogs.

"It is not expected, however, that the processors' net margin would absorb a large part of the tax, since this margin in total normally averages between $1.50 and $2.00 per hundredweight of hogs, live weight basis, as

compared with the processing tax of $2.25 per hundredweight.

"PROCESSORS' GROSS MARGIN LESS

"When it comes to the aggregate of processors' margins, that is, unit margin times the supply of hogs handled, a reduction has taken place. It is this reduction which is reflected in an increase in the percentage of consumers' expenditures going to producers.

"In the case of handlers other than processors, such as transportation agencies and retail distributors, it appears that on the average, unit handling margins have tended to increase rather than decrease but that the increases which have occurred largely reflect increases in operating costs. Increases in unit margins have been offset to some extent by the reduction in the total volume of hogs and hog products handled.

"CONCLUSION

"Because the processing tax is instrumental in one way or another in raising food prices, it is liable to be regarded with considerable disfavor by those who take a short-time view of the desirability of cheap food regardless of whether farmers get a fair return. In the long run, however, the desirable price is that price which will yield a fair return to the farmer, enabling him to continue to produce adequate supplies of agricultural products. If farming is a losing proposition over an extended period, eventually total production falls below a desirable

level and consumers must then pay extremely high prices for food. Balanced production is important to the permanent welfare of consumers.

"Among producers there is a tendency to feel that if the processing tax were removed the open market price might be higher by at least a part of the tax and that the total income from hogs would be practically as large as when the tax was in effect. In the case of hogs, this might prove to be true for a time. However, without the processing tax or some other means of raising revenue, there would be no benefit payments and none of the price-raising effects which result from production adjustment. Without an adjustment program, hog production would be likely to increase to high levels again and both price and total income would fall."

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Exhibit B.]

[Title of Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard this 9th day of August, 1935, before Hon. Paul J. McCormick, Judge of the above entitled court, on the application of said plaintiff for a preliminary injunction upon plaintiff's verified complaint and petition for injunction, due notice of the hearing of which application was given to defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and on the written motion of defendant to dismiss the bill of complaint and petition for injunction; and after hearing counsel for the respective parties and the matters having been submitted to the Court for its consideration, and it appearing to the Court, and the Court finds that it is true, that certain processing taxes are due and payable from the plaintiff under the terms of said Agricultural Adjustment Act hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act, that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition, for the reason that there is immediate danger that said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, will proceed under said Act to collect from said plaintiff said taxes and in so doing will distrain, levy upon, and sell the property of plaintiff described in said bill of complaint and petition

of a large value, thus causing the plaintiff an irreparable loss of such property and the goodwill of plaintiff's business, likewise mentioned in said bill of complaint and petition, and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy, and adequate remedy at law in the premises; that if said restraining order is not so issued, there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act, and that for all these reasons a preliminary restraining order should issue against the defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, as prayed for in said bill of complaint and petition,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1st. That said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, his officers, agents, servants, employes, and attorneys, and those in active concert or participation with him and who shall, by personal service or otherwise, have received actual notice hereof, shall be and they are and each of them is hereby enjoined and restrained from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff, Armour & Company, a corporation, any processing taxes now due from and payable by plaintiff under and pursuant to the said Agricultural Adjust-

ment Act adopted by the Seventy-third Congress of the United States, and being

"An act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes,"

which Act was approved on May 12, 1933, and all acts amendatory thereof; from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff any taxes hereafter to become due from and payable by plaintiff and arising under the terms of said Act on hogs processed by it; from imposing or collecting or attempting to impose or collect upon or from said plaintiff any interest or penalties on account of plaintiff's failure to pay any of said processing taxes payable by plaintiff under the force of the Act, whether now due or hereafter to become due from plaintiff; from imposing or filing or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non payment by plaintiff of any of said processing taxes, whether now due or hereafter to become due from plaintiff under the Act; from levying upon or distraining or selling plaintiff's slaughter house, packing plant, the machinery and appliances therein contained and used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and money in bank or any of such property or any other property of plaintiff on account or by reason of such non-

payment of said or any of said processing taxes, whether now due or hereafter to become due from and payable by said plaintiff under said Act, all from the date of the issuance of this preliminary injunction until the final decree of the Court in this case or until further order of this Court;

2nd. This injunction is granted upon the condition that the plaintiff shall furnish security to the defendant, Nat Rogan, as Collector of Internal Revenue, as aforesaid, by undertaking with sufficient sureties, to be approved by the Court, in the penal sum of $17,370.00, conditioned that plaintiff will pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court in the event it is finally decided this restraining order was improperly issued or this action is dismissed; provided that in lieu of such undertaking plaintiff shall have and is hereby given the option of depositing the said sum of $17,370.00 in lawful money of the United States with the Clerk of the above entitled Court, subject to like conditions; and upon the further condition that said plaintiff shall continue to file with said Nat Rogan, as said Collector of Internal Revenue, monthly returns on all hogs processed by it, as required by said Act, such returns to be made on the forms provided therefor by the said Collector of Internal Revenue; and file a bond or deposit with the Clerk the amount of the tax shown to be due by such return.

3rd. The Court, however, reserves the right to require additional security from plaintiff from time to time, as may seem to the Court necessary to protect the defendant, Nat Rogan, as said Collector of Internal Revenue, or to

modify this order in any part or particular after notice to the parties hereto; and

4th. That the said motion of defendant to dismiss plaintiff's bill of complaint and petition for injunction is denied and defendant is allowed fifteen (15) days after notice hereof within which to answer said bill of complaint and petition for injunction.

Dated at Los Angeles, California, this 15th day of August, 1935.

By the Court.

PAUL J. McCORMICK
Judge of the said District Court

APPROVED AS TO FORM
CLYDE THOMAS
Attorneys for Defendant.
Asst. U. S. Atty.

[Endorsed]: Received copy of the within Temporary Injunction this 16th day of August, 1935. Nat Rogan, Collector of Int. Rev. E. M. Cohee.

Filed Aug. 15, 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Exhibit C.]

[Title of Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

Comes now the plaintiff and with leave of Court files this, its supplemental complaint, and alleges:

I.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Section 21, subdivision (d) (1), and reading as follows:

"(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any over-payment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part

of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claims, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be considered by the Court. * * * *."

That by the enactment of said legislation plaintiff has been deprived of any adequate remedy at law to sue for the refund of processing taxes or to litigate before this Court or any other tribunal, the question of legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of process taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them. That said legislation imposes onerous conditions which cannot be complied with because evidence of all the facts which operate to affect the sales price of the commodity sold by plaintiff in respect to which the tax is imposed is not available and cannot be produced by plaintiff. That the said processing tax is assessed, levied and collected on the basis of the live weight of the commodity processed by plaintiff. That the said commodity, after being purchased by the plaintiff is converted into nine (9) major articles, and other miscellaneous ones which are affected by separate and distinct market trends and conditions of various fluctuations over periods of time varying in length with each article running from a period of a few days to several months. That upon such conversion of the said commodity into said articles the said commodity loses its

identity. That the prices obtained by plaintiff for said articles or products are determined by competition in open and free markets. That said prices fluctuate daily, and in some cases, hourly. That the determination of the extent to which the purchase price obtained by plaintiff might constitute or be properly held to constitute a portion of the processing tax theretofore paid by plaintiff involves the consideration of factors which it is impossible for plaintiff to establish by proof and that such inability does not arise from any failure on the part of plaintiff to keep accurate and complete records, but arises from circumstances beyond plaintiff's control, which determine the matter of marketing said product and the conditions thereof That by reason of the foregoing requirements of said Act, plaintiff would not be able to recover any part of the tax paid as the proof, the burden of which is placed upon plaintiff, cannot be made by it, and this without any fault on the part of plaintiff, and irrespective of the fact that plaintiff has lost money in the handling of its pork products during each month in which the said Agricultural Adjustment Act has been in operation.

That the purported right, as provided by said Act, to sue for a refund for the amount of tax not passed on, is purely illusory for the reason that an error in the computation of one cent in the amount claimed would result in the loss and forfeiture of the entire amount, even though said amount be several thousand dollars.

II.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment

to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Division 8 of Section 21, subdivision (d) (2), and reading as follows:

"(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceedings relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be

so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail."

That by reason of the enactment of the said Statute, plaintiff has no present remedy at law whatsoever, and is not permitted to sue for refund of processing taxes or to litigate in any tribunal the question of the constitutionality of said Agricultural Adjustment Act, or collection of processing taxes thereunder, or to recover any judgment for the refund thereof.

That under the provisions of said Act plaintiff is deprived of any right to obtain consideration for its claim for refund or recovery of the amount of any tax until after the Act is finally declared invalid. That plaintiff's claim, when filed, must be filed pursuant to rules and regulations of the Commissioner of Internal Revenue, with the approval of the Secretary, which rules have not been promulgated. That by the provisions of said Act the Commissioner of Internal Revenue, before whom such claims must be filed for recovery or refund, is given one year in which to pass thereon after the filing of such claim, and plaintiff cannot bring any action at law until after the period of one year from such filing unless the Commissioner of Internal Revenue has made his ruling upon plaintiff's claim prior to that time. That by reason of the said restriction upon plaintiff's right to sue for refund, there is no plain, speedy, or complete remedy at law, which is available to plaintiff.

WHEREFORE, plaintiff being without a plain, certain, and adequate remedy at law, and being able to obtain relief only in a court of equity prays for all relief sought in the original bill of complaint herein, and for all other and proper relief.

GIBSON, DUNN & CRUTCHER
J. C. MACFARLAND
By J. C. MACFARLAND
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. C. MACFARLAND being by me first duly sworn, deposes and says: That he is a member of the firm of Messrs. Gibson, Dunn & Crutcher, attorneys for the plaintiff in the above entitled action; that he has read the foregoing Supplemental Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this affidavit for the reason that all officers of plaintiff are at present absent from the County of Los Angeles where said firm has its offices.

J. C. MACFARLAND

Subscribed and sworn to before me
this 10th day of September, 1935.

MARY S. ALEXANDER
Notary Public in and for the County
of Los Angeles, State of California.
(Seal)

[Endorsed]: Sep. 12, 1935 R. S. Zimmerman, Clerk
By B. B. Hansen, Deputy Clerk.

[Exhibit D]

[Title of Court and Cause]

MINUTE ORDER ON MOTION TO VACATE TEMPORARY INJUNCTION

August 30, 1935

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the regular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

To NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, and to his deputies, officers, servants, and agents:

WHEREAS, in the above named cause it has been made to appear, by the verified bill of complaint and petition of plaintiff filed herein, that a restraining order preliminary to hearing upon application for a preliminary injunction is proper because of the allegations of immediate and irreparable injury, loss, and damage set forth in said bill of complaint and petition, and that prima facie the plaintiff is entitled to an order restraining temporarily the said defendant, Nat Rogan, as Collector of Internal Revenue for said Sixth Collection District of California, and his deputies, officers, servants, and agents, from doing the acts therein complained of,

NOW, THEREFORE, on motion of the plaintiff, by its attorneys, IT IS ORDERED that said Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, appear before the District Court of the United States, Southern District of California, Central Division, before Honorable Jaul J. McCormick, Judge of said Court, at his Courtroom, in the Federal Building in Los Angeles, California, in said District, on the 9th day of August, 1935, at the hour of 10 o'clock A. M. of that day, then and there to show cause, if any

there may be, why the preliminary injunction prayed for in said bill of complaint and petition and in said motion requested, should not issue.

~~And it appearing to the Court from said bill of complaint and petition that there is present danger that irreparable damage and injury will be caused plaintiff before a notice can be served on defendant and a hearing had thereon, unless said Nat Rogan, as said Collector, his deputies, officers, servants, and agents are restrained temporarily as herein set forth; for the reason as averred in the said bill of complaint and petition, certain taxes therein noted are due and payable; that if said taxes are not paid, the said Collector of Internal Revenue threatens to and will, in order to collect such taxes, distrain, levy upon, and sell the property of the plaintiff of a large value, thus irreparably destroying to plaintiff such property and the goodwill of its business described in the said bill of complaint and petition; that plaintiff has no adequate and complete remedy at law for recovery, as alleged in said bill of complaint and petition; that such injuries are irreparable to plaintiff because they can not be compensated for in damages and may subject plaintiff to great penalties.~~

[P J M J]

~~IT IS FURTHER ORDERED that said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and all of his deputies, officers, servants, and agents be and they are, and each of them is, restrained~~

(1) From assessing or attempting to assess against, or collecting or attempting to collect from plaintiff, under the Agricultural Adjustment Act, mentioned and described in plaintiff's bill of complaint and petition on file herein, the processing tax therein provided to be assessed against and collected from plaintiff on processing of hogs by it, whether such collecting or attempt to collect such tax be by distraint, levy, sale and/or action at law or in equity;

(2) From collecting or attempting to collect said processing tax from said plaintiff in any other manner;

(3) From imposing or filing, or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non-payment of said processing tax;

[P J M J]

(4) From enforcing or attempting to enforce any penalties against the plaintiff for the non-payment of said processing tax; and

(5) From enforcing or attempting to enforce any of the provisions of said Act applicable to plaintiff in relation to said processing tax.

This temporary restraining order shall remain in force for .... days from the time of the entry hereof, or until further order of the Court.

This temporary restraining order is granted without notice because the injuries alleged in said bill of complaint and petition are irreparable and liable to occur before a hearing upon notice can be had.

IT IS FURTHER ORDERED that copies of this order certified under the hand of the Clerk and the seal of this Court be served upon defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and that such copies, together with said bill of complaint and petition, be served upon said defendant on or before the 5th day of August, 1935.

This order signed and issued this 3rd day of August, 1935, at 9:50 o'clock A. M.

By the Court.

PAUL J. McCORMICK
Judge

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Exhibit E]

[Title of Court and Cause]:

ORDER ALLOWING APPEAL

On motion of Gibson, Dunn & Crutcher and J. C. Macfarland, attorneys for plaintiff, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made and entered on August 30, 1935, dissolving the temporary injunction granted heretofore to the plaintiff in the above entitled suit, on or about the 8th day of August, 1935, be and the same is hereby allowed, and that a certified transcript of the record and all proceedings, papers, instruments, and documents herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit;

That, in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the temporary injunction heretofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, should be pursued by the plaintiff in the form of an application for an injunction pending appeal to be presented to said United States Circuit of Appeals for the Ninth Circuit if the plaintiff wishes to secure such relief.

It is, further, ordered that the cost bond on appeal be fixed in the sum of $250.00.

Dated: September 14th, 1935.

PAUL J. McCORMICK
Judge of said District Court

[Endorsed]: Received copy of the within order this 14th day of September 1935. Peirson M. Hall, D. H. Attorney for Rogan.

Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

UNDERTAKING ON INJUNCTION

WHEREAS, the above named plaintiff has commenced the above entitled action and summons has issued therein, in the District Court of the United States, Southern District of California, Central Division, against the above named defendant, and whereas the said plaintiff has applied for and has been granted a preliminary injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described,

NOW, THEREFORE, Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and duly licensed to transact a general surety business in the State of California, in consideration of the premises and of the issuing of said injunction, undertakes, in the sum of seventeen thousand three hundred seventy dollars ($17,370.00), and promises to the effect, that in case said injunction shall issue the said plaintiff will pay to the said party enjoined all taxes chargeable against plaintiff on account of the matters and things described in said complaint, together with all costs assessed by the Court, in the event that it is finally decided that injunction was improperly issued or in the event that this action is dismissed, not exceeding, however, the total sum of seventeen thousand three hundred seventy dollars ($17,370.00).

IN WITNESS WHEREOF, the said Surety has caused its corporate name and seal to be hereunto affixed

by its duly authorized attorney-in-fact, at Los Angeles, California, on the 15th day of August, A. D. 1935.

MARYLAND CASUALTY COMPANY,

(Corporate Seal) By C. W. Keefer
Attorney-in-fact

I HEREBY APPROVE THE FOREGOING BOND

Dated: The 15th day of August, 1935.

Paul J McCormick
Judge

STATE OF CALIFORNIA,)
(SS:
County of Los Angeles.)

On this 15th day of August, A. D., 1935, before me, Frances B. Gray, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Keefer, known to me to be the Attorney-in-fact of the Maryland Casualty Company, the corporation that executed the within and foregoing instrument, and known to me to be the person who executed the within instrument on behalf of such corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Frances B. Gray (Seal)
Notary Public in and for the County of Los Angeles, State of California

My Commission Expires Jan. 6, 1938

[Endorsed]: Filed Aug 15 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE TEMPORARY INJUNCTION

TO ARMOUR & COMPANY, a corporation, plaintiff in the above entitled action, and

TO GIBSON, DUNN & CRUTCHER, its attorneys:

You, and each of you, will please take notice that the defendant above named will move the above entitled court, in the courtroom of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, on the 27 day of August, 1935, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the temporary injunction heretofore entered, on the grounds and for the reasons stated in said motion, copy of which is hereunto attached.

Dated: This 22 day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Received copy of the within document Aug 22 1935 Gibson, Dunn & Crutcher Per A

[Title of Court and Cause.]

MOTION TO VACATE TEMORARY INJUNCTION.

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Reevnue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 15th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate, and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved ...., which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of $1,000,000,000, and the immediate stopping

of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plaintiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's Bill of Complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22d day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney,
Attorneys for Defendant.

CT:ah

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman, Clerk. By B. B. Hansen Deputy Clerk

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS

TO: ARMOUR & COMPANY, a corporation, and GIBSON, DUNN & CRUTCHER, Attorneys at Law, 634 South Spring Street, Los Angeles, California, its Attorneys.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that defendant herein will move the above entitled court in the courtroom of the Honorable Paul J. McCormick, United States District Judge, on the 9th day of August, 1935, at the hour of 10:00 o'clock A. M., of that day, for an order of said Court dismissing the above entitled proceeding.

Said Motion will be based upon the pleadings, records and files in said action, and upon the grounds stated in said motion to dismiss.

Dated: This 6th day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney

[Endorsed]: Received copy of the within document Aug 6 1935 Gibson, Dunn & Crutcher Per A

[Title of Court and Cause.]

MOTION TO DISMISS

COMES NOW Nat Rogan, Collector of Internal Revenue for the Sixth District of California, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant U. S. Attorney for said District, and moves the Court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I.

That the Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complianant has a plain, adequate and complete remedy in the ordinary course at law.

II.

That the United States of America is a real party in interest and it may not be sued without its consent.

III.

That there is no actual controversy between complainant and defendant, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV.

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States, and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V.

That the proceeding attempted to be instituted by this complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION.

COMES NOW the defendant Nat Rogan as Collector of Internal Revenue for the Sixth district of California, in the above entitled cause, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, alleges:

I.

That the defendant is a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II.

That the duties of said defendant are to collect taxes levied under the Internal Revenue Laws of the United States.

III.

That the Complaint in the above entitled case seeks to enjoin the defendant from collecting taxes levied under and by the Internal Revenue Laws of the United States.

IV.

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the

purpose of restraining the assessment or collection of a federal tax.

V.

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI.

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

DATED: This 6th day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: Received copy of the within document Aug 6 1935 Gibson, Dunn & Crutcher Per A

Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now this 13th day of September, 1935, comes the plaintiff, Armour & Company, a corporation, and files this, its Assignment of Errors upon which it will rely in its appeal from the order dissolving the temporary injunction heretofore granted to the plaintiff, which order was made and entered in the above suit on the 30th day of August, 1935. Plaintiff states that the order dissolving the said temporary injunction was erroneous and unjust to the plaintiff in the particulars and for the reasons hereinafter set forth:

FIRST: The Court erred in dissolving said temporary injunction because the said order was not made or entered upon the Court's own motion, but solely upon the motion of the defendant, and without any showing by the defendant necessitating the dissolution of the injunction, and without any showing of change of conditions or circumstances occurring between the time of granting the temporary injunction and the date of said order dissolving said temporary injunction which required any act by the Court in the exercise of its equitable powers.

SECOND: The Court erred in dissolving said temporary injunction because the circumstances and conditions which were set forth in plaintiff's complaint, and not contradicted by the record in said cause, and which allegations were found by the Court to be true, and which necessitated the granting of the temporary injunction, continued in existence at the time of the said order dissolving the said injunction.

THIRD: The Court erred in dissolving said temporary injunction because the plaintiff was entitled to the

temporary injunction until the trial and determination of the suit and during pendency thereof; that said suit is still pending and no answer has been filed to plaintiff's Bill of Complaint by defendant, defendant's motion to dismiss the Bill of Complaint having been denied and the objections interposed by the defendant to the granting of the temporary injunction having been overruled.

FOURTH: The Court erred in dissolving said temporary injunction bceause the said order dissolving the temporary injunction theretofore granted was made by the Court upon the erroneous assumption that the decision or ruling of the United States Circuit Court of Appeals for the Ninth District, in the case of Fisher Flouring Mills Company, a corporation, v. Alex. McK. Vierhus, Individually and as Collector of Internal Revenue for the District of Washington, No. 7938, and companion cases, which decision or ruling was made on or about the 15th day of August, 1935, is binding and conclusive on District Courts of the United States located within the jurisdiction of said United States Circuit Court of Appeals for the Ninth District, irrespective of the facts herein involved, admitted by the defendants, and found to be true by the Court in its order for temporary injunction, and which facts and recitals are different from and unlike the facts involved and considered by said United States Circuit Court of Appeals in the aforesaid case of Fisher v. Collector.

FIFTH: The Court erred in dissolving said temporary injunction because since the passage by Congress of H. R. 8492, which occurred subsequent to the decision of the Circuit Court of Appeals in the said case of Fisher Flouring Mills Company, a corporation, vs. Alex McK. Vier-

hus, etc., any remedy at law that plaintiff has heertofore possessed has been rendered so cumbersome, capricious, uncertain, unwieldy, and impossible of proof as to deprive the plaintiff of any and all remedy at law.

SIXTH: The Court erred in dissolving said temporary injunction because, since the passage of the Amendments to the Agricultural Adjustment Act embodied in H. R. 8492, any semblance of a remedy at law that the plaintiff formerly had is no longer in existence.

SEVENTH: The Court erred in dissolving said temporary injunction because the remedy to which plaintiff is relegated, through denial of injunctive relief pending trial, is harsh, oppressive, capricious, cumbersome and costly, entirely illusory, and of no practical or any relief.

EIGHT: The Court erred in dissolving said temporary injunction because in the nature of the products handled and manufactured by the plaintiff from the commodity upon which the processing tax can be assessed, levied, and collected, it is impossible to determine what portion, if any, of said processing tax is included in the sales price of the product which is manufactured from the commodity upon which said tax can be assessed, levied, or collected, and thereby plaintiff would not be able to recover any of the tax paid, as the proof, the burden of which is placed upon it by said Amendments to the Agricultural Adjustment Act, cannot be made by it; that such inability does not arise from any failure on the part of plaintiff to keep full, true, and complete records, but because the commodity is converted into various articles which are affected by separate and distinct market trends and conditions of various fluctuations, over periods of time varying in length with each article; and for the reason that

while the tax is assessed, levied, and collected on a basis of the live weight of the commodity processed by the plaintiff, said commodity entirely loses its identity upon being converted into said various articles, and it is impossible, upon any sale of said articles which may have heretofore been made by plaintiff, or which may hereafter be made by plaintiff, to show or to produce any evidence whatsoever tending to show from what particular hog or hogs, the articles sold are derived, or to trace the said articles or merchandise involved in any sale back to the commodity processed by plaintiff and upon which the tax is paid.

NINTH: The Court erred in dissolving said temporary injunction because, if plaintiff's claim or claims for refund under the said Act as amended are refused and plaintiff thereupon files suit, the plaintiff is again confronted with the same limitations and restrictions which are imposed upon it in the making of claim, in that, in addition to any other proof required of it in the suit for the recovery of the tax, plaintiff must prove that it has not passed any part of the tax, which proof is, from a practical standpoint, utterly impossible, whereas, in truth and in fact, it cannot pass the tax to the purchasers of its products as it has no control of the competitive markets in which its products must be sold, and has not done so; and defendants have admitted, by their failure to deny the allegations of the complaint, that plaintiff is unable to pass the processing tax it is compelled to pay or which is assessed against it.

TENTH: The Court erred in dissolving said temporary injunction because any remedy at law that plaintiff may have is not a full or complete or speedy remedy in that it is uncertain whether plaintiff can file any claim for

refund or recovery of the amount of any tax or penalty at this time, or whether such claim can be filed only after the final determination of the invalidity of the law imposing the tax; and, in fact, no provision for filing of claims has been made, nor has any machinery for the consideration thereof been provided, except after the Act is finally declared invalid; no means are provided for the consideration of any such claim for refund or repayment of any tax or penalty by the Commissioner until after the law is declared finally invalid; such claim can only be considered in the manner in the Act provided, only after the Act, pursuant to which such tax is assessed, levied, and collected, is finally declared invalid, and the filing or attempted filing of a claim at any prior time would avail the plaintiff nothing and the Commissioner is given one year from the time such Act is declared invalid in which to pass upon the claim of the plaintiff; because the claimant is not permitted to bring any action until the expiry of one year from the time of filing of any claim for recovery or refund, and such claim for recovery or refund cannot be considered until after the law under which the tax is assessed, levied, and collected has been finally held invalid; the running of the one year's time given to the Commissioner for the purpose of passing on the claim would be calculated from the time the Act under which such taxes are assessed, levied, or collected is finally held invalid if the claim has been filed prior thereto: no obligation is placed upon said Commissioner to determine said claim prior to the expiry of one year.

Until the Act is finally declared invalid, by reason of violating the provisions of the Constitution of the United States of America, or otherwise, plaintiff has no remedy

of any sort at law, and, until such time, plaintiff, without intervention of equity, must pay the tax monthly on the basis promulgated by the Secretary of Agriculture, and await final decision as to whether said Act is invalid; that, only after the final determination of such invalidity, do any remedies at law come into being.

In addition to any other compliance with law, plaintiff, though having paid the tax, must show and establish to the satisfaction of the Commissioner of Internal Revenue that the tax paid, or any part thereof, has not been passed to the vendee in any manner whatever. That the commodity handled by the plaintiff, in relation to which processing taxes are assessed, is converted into numerous products and by-products, subject to many variable and various market conditions, and the burden imposed by the law upon plaintiff, in seeking refund, to establish that no part of said tax has been passed to the vendee is impossible of compliance.

The said amendments provide that the transcript of hearing before the Commissioner shall be filed in the Court in which plaintiff may be enttiled to maintain any action in case the Commissioner finds that any part of the tax has been passed on in any form whatever to the vendee and shall constitute the record before said court. Plaintiff is required by the Act as amended to file a certified copy of the proceeding had before the Commissioner of Internal Revenue. The Commissioner of Internal Revenue is not a party to such litigation, and any conclusion of the Commissioner is not to be adduced and determined in accordance with the rules of law and the rules of evidence, and no provision of law exists requiring that the Commissioner, or any person conducting such hearing on his be-

half, shall be skilled or versed in or have knowledge of rules of law and rules of evidence. On the contrary, such proof is required to be made to the Commissioner's satisfaction.

ELEVENTH: The Court erred in dissolving said temporary injunction because if said Agricultural Adjustment Act as amended is and shall be declared to be invalid, there is no appropriation of funds by Congress now available, or now provided to be available in the future, fgrom which plaintiff has the right to be repaid or will be repaid any amount of processing taxes hereafter paid by it; that while said Act as Amended to date purports to appropriate money to the Secretary of Agriculture for the purpose, among others, of making refunds of processing taxes paid, said appropriation has been exhausted and exceeded by expenditures charged and chargeable against it and nothing is available of said appropriation from which plaintiff can be paid.

TWELFTH: The Court erred in dissolving said temporary injunction because plaintiff cannot under the Amended Act pursue any remedy at law until the law has been finally declared unconstitutional, and cannot maintain any suit or action for recovery of any tax paid, in any event until action by the Commissioner of Internal Revenue, and the Commissioner of Internal Revenue need not take the action set forth in the Act until one year after the filing of claim; and even after the plaintiff is permitted to maintain an action under the law, the action, in its very nature, is not tried for some time after the bringing thereof; the proof required of plaintiff is detailed, cumbersome, and exacting to a prohibitive extent and, after judgment, an appeal may be had and taken upon

issues having nothing to do with the illegality of the tax exacted from the plaintiff, and plaintiff has no way of being compensated for the harassment and vexatiousness imposed upon it.

Under the Amendments to said Act, if plaintiff were to pursue the remedy at law therein outlined and set forth, plaintiff would have no means of recovering the taxes collected under a law which plaintiff alleges to be illegal and invalid, and unconstitutional.

THIRTEENTH: The Court erred in dissolving said temporary injunction because irreparable injury and damage will be suffered by the plaintiff unless plaintiff has injunctive relief during the pendency of the suit and until its trial and determination, particularly because plaintiff will be compelled to engage in the prosecution of many suits for the recovery of money paid by way of said processing taxes.

Said processing taxes will be payable monthly, and each month constitutes a separate taxable period under the Act as amended. Plaintiff would be compelled to file claim for refund appertaining to each taxable period and, irrespective of the illegality of the processing taxes and the Act of Congress by virtue of which such taxes are assessed, levied and collected, engage in and have placed upon it the cumbersome requirement of showing whether any portion of the tax has been included in the sales price of any of the commodity upon which it is liable for or pays processing taxes; that under the requirements of said Act, claimant is forced to preserve as fully as possible whatever evidence is obtainable as to each transaction of purchase and sale occurring during each month, and plaintiff will be required to bring proceedings involving separate issues as to each said taxable period of one month.

FOURTEENTH: The Court erred in dissolving said temporary injunction because the Court had power to restrain the assessment, levy, or collection of the said tax which is invalid, unlawful, and unconstitutional for the reasons set forth in plaintiff's complaint and under the circumstances found by the Court to be true, establishing plaintiff's right to equitable relief, the Court was not authorized, upon defendant's motion, without any showing of change of circumstances or consideration of the facts entitling the plaintiff to such relief to vacate said Order solely upon the ground that the Ninth Circuit Court of Appeals in a decision involving an application for an injunction pending appeal by another processor upon a record presenting facts in no wise similar to those involved in the present case, had denied such injunction.

FIFTEENTH: The Court erred in dissolving said temporary injunction because unless the Collector of Internal Revenue is restrained in a manner similar to that ordered in the temporary injunction in force herein prior to the Order of the Court, said Collector will file liens upon the property, chattels, goods, wares, merchandise, and assats of plaintiff, and will enter upon its property for the purpose of distraining and selling it, all of which will destroy plaintiff's business, custom, good will, and credit, for which it cannot be adequately or speedily or completely compensated in damages. That these acts of the Collector of Internal Revenue will be repetitive and will appertain to each taxable period of one month each and that, further, in the nature thereof, a trespass upon the property, lands, and tenements of the plaintiff will take place and occur each time the Collector will exercise, as he threatens to do, the things and matters he is required to

do under the law in the collection of said processing taxes; that, in each instance, such trespass will occur and be committed, not only by the Collector, but by his agents, servants, attorneys, deputies, and employees, who are numerous, and such trespass, in each instance, need not occur by the same individuals, but will likely be done and committed by other and different agents, servants, attorneys, deputies, and employees of said Collector, and, in each instance, if the law under which such assessment, levy, and collection is made is declared to be unconstitutional, a different set of individuals, acting as such agents, servants, attorneys, deputies, and employees, may be guilty of trespass and give rise to numerous and various causes and rights of action against such trespassers, and compel the plaintiff to engage in many actions for the relief therefor, all of which are slow and tedious and may be against persons unable to respond in damages, and any such remedy that plaintiff may have will be but an empty remedy and of no avail to it.

SIXTEENTH: The Court erred in dissolving said temporary injunction because the method of seeking relief so placed upon the plaintiff as a taxpayer amounts to a circuitous method of collecting unlawful taxes levied beyond any power of Congress, as given to Congress by the Constitution of the United States of America, and to compel plaintiff to follow the procedure of a purported action at law is simply to deny plaintiff all relief and to subject it to harassment, cost, and great difficulty or proof upon matters appertaining to entirely novel and vexatious accounting matters, not subject to any ready or definite standard, and involving many disputatious elements.

SEVENTEENTH: The Court erred in dissolving said temporary injunction because the Order dissolving the temporary injunction heretofore granted to the plaintiff herein will, in effect, result in taking the property of the plaintiff without due process of law, in that, after taking the property of the plaintiff in satisfaction of the taxes assessed and levied under said Agricultural Adjustment Act, as amended, the remedies provided to the plaintiff, and which plaintiff would be compelled to pursue, where injunctive relief is denied to it, are so cumbersome, costly, and limited and uncertain as to amount to a denial of any relief to it.

EIGHTEENTH: The Court erred in dissolving said temporary injunction because, ever since the assessment, levy, and collection of taxes under the Agricultural Adjustment Act, plaintiff has suffered loss as a processor of hogs, due solely and directly to the tax imposed thereunder, which has prevented plaintiff from earning, during said period, an adequate or reasonable return upon the value of its investment in said business.

The processing taxes imposed are so heavy that the payment of such taxes will, with each payment, tend to diminish the capital of the plaintiff, and to restrict and diminish its operations, and plaintiff will, in the nature of things, be compelled to restrict its business, or, if it abandons its hog processing business, it will be unable to compete with others engaged in a like line of business. That such results will flow naturally, proximately, and

directly by reason of the imposition and collection of said taxes, which are void, invalid, and unconstitutional, in that the Agricultural Adjustment Act, particularly in the respects wherein this plaintiff is concerned, is invalid, unlawful, and unconstitutional, for the reasons and in the particulars set forth in plaintiff's complaint herein.

NINETEENTH: The Court erred in dissolving said temporary injunction because great harm and irreparable injury will be suffered by plaintiff by reason of the dissolution of the temporary injunction and no harm or loss can be incurred or suffered by defendant by its continuance; such obligations as have been incurred by the Secretary of Agriculture were incurred prior to the assessment or levy or collection of any so-called taxes from the plaintiff and no opportunity exists or has been accorded plaintiff to agree to, discuss or in any wise participate or act upon or in connection with the incurring of such obligations, and the sum sought to be levied against and collected from the plaintiff in the guise of such taxes are for the purpose of the payment of such obligations of the Secretary of Agriculture incurred, and which obligations were not incurred in the course of any valid or lawful authority vested in said Secretary of Agriculture.

TWENTIETH: The Court erred in dissolving said temporary injunction because non-compliance by the plaintiff with the Act of Congress set forth in plaintiff's suit, which violation will consist in the non-payment of the taxes imposed under said Act, will subject the plaintiff to great harassment and oppression, and to fines and

penalties, and subject its officers to criminal prosecution therefor.

WHEREFORE, plaintiff prays that the order and decision dissolving the temporary injunction be reversed, and that the Court make such orders as may be necessary or proper to afford plaintiff the relief to which it is entitled and that speedy justice be done to the parties in that behalf.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER,
By J. C. Macfarland
Attorneys for Plaintiff

IRA C. POWERS
Of Counsel

We, the undersigned attorneys, certify that the foregoing Assignment of Errors is made on behalf of the plaintiff, Armour & Company, a corporation, and is, in our opinion, well taken, and the same now constitutes the Assignment of Errors upon which it will rely in its prosecution of the appeal herein.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER
By J. C. Macfarland
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Assignment of Errors this 14th day of September 1935 Peirson M. Hall D H Attorney for Rogan.

Filed Sep 14 1935 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 9th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, Collector, etc.	)	
Defendant.	)	

This cause coming on for hearing on Order to Show Cause, filed August 3rd, 1935, directed to Nat Rogan, Collector, to show cause why Preliminary Injunction prayed for in the Bill of Complaint should not issue, etc.; and, for hearing on Motion of defendant for an Order of the Court dismissing proceeding, pursuant to Notice filed August 6th, 1935;

J. C. McFarland, Esq., appearing for the Petitioner herein, makes a statement, following which Peirson M. Hall, U. S. Attorney, appearing for the Government, makes a statement, and Clyde Thomas, Assistant U. S. Attorney, also of counsel for the Government, argues to the Court, at this time, and Eugene Harpole, Esq., being present and appearing specially for the Bureau of Internal Revenue, the Court makes a statement, and orders Preliminary Injunction granted and Motion to dismiss denied. Exception noted.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Tuesday, the 27th day of August, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, etc., et al.	)	
Defendants.	)	

The above and foregoing entitled and numbered causes coming before the Court, at this time, for hearing on Motions of defendants for Orders vacating and setting aside Temporary Injunctions heretofore entered, etc., pursuant to Notices filed August 22nd, 1935;

A. M. Randol is present and acts as the official stenographic reporter of the testimony and the proceedings, and the plaintiff in each of the above entitled causes being represented as follows, to-wit:

Geo. M. Breslin, Esq., appears for the plaintiff in Cases, Nos. Eq.-698-H and Eq.-708-J; J. E. Blum, Esq., appears for the plaintiff in Cases, Nos. Eq.-702-J, Eq.-703-H and

Eq.-719-C; W. Torrence Stockman, Esq., appears for the plaintiff in Cases, Nos. Eq.-710-H and Eq.-739-C; John C. Stick, Esq., appears for the plaintiff in Cases, Nos. Eq.-732-H and Eq.-733-H; Benjamin W. Shipmen, Esq., appears for the plaintiff in Case No. Eq.-694-C; Attorneys Hibbard and Kleindienst appear for the plaintiff in Case No. Eq.-711-M; Leon Levy, Esq., appears for the plaintiff in Case No. Eq.-721-J; Leon Kaplan, Esq., appears for the plaintiff in Case No. Eq.-737-M; J. C. McFarland, Esq., appears for the plaintiff in Case No. Eq.-740-C; W. K. Tuller, Esq., appears for the plaintiff in Case No. Eq-741-J; and, Peirson M. Hall, U. S. Attorney, Clyde Thomas, Assistant U. S. Attorney, and Francis A. Le Sourd, Esq., Special Assistant to the U. S. Attorney General, all appearing for the respondents herein;

Now, at the hour of 11 o'clock a. m. counsel answer ready in all cases, whereupon, the Court orders hearing herein proceed; and

******(Argument of counsel)******.

At the hour of 4:55 o'clock p. m. the Court orders said Motions submitted for decision.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 12th day of September in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: Paul J. McCormick, District Judge.

Armour & Co., a Corp.,	)	
Plaintiff,	)	
vs.	)	No. 740-C Eq.
Nat Rogan, etc.,	)	
Defendant.	)	

These causes coming on for hearing on (1) Petitions for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases Nos. 698-H, 708-J, 710-H and 740-C; George M. Breslin, Esq. appearing for the Plaintiffs in cases Nos. Eq-698-H and Eq-708-J, Benjamin W. Shipman, Esq. appears for the Plaintiff in case No. Eq-694-C, W. Torrence Stockman, Esq. appears for the Plaintiff in Case No. Eq-710-H; John C. MacFarland, Esq. appears for the plaintiff in case No. Eq-740-C, and J. E. Blum, Esq. appearing for the Plaintiffs in cases Nos. Eq-702-J, Eq-703-H, and Eq-719-C; and Philip N. Krasne, Esq. appearing for Plaintiff in case No. Eq-737-M; Peirson M. Hall, U. S. Attorney and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock P. M. counsel answer ready in all matters, following which,

George M. Breslin, Esq. makes a statement, and,

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p. m., George M. Breslin, Esq. argues to the Court in support of petitions for rehearing; after which,

At the hour of 2:30 o'clock p. m., Peirson M. Hall, Esq. argues to the Court in reply thereto.

At the hour of 3:10 o'clock p. m., John C. MacFarland, Esq. makes closing argument in behalf of the plaintiffs; following which,

At the hour of 3:15 o'clock p. m., J. E. Blum, Esq. makes a statement.

The Court now renders its oral opinion and orders that each motion for rehearing be severally denied and exceptions allowed.

Upon motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is ordered that Supplemental Bills of Complaint in cases Nos. Eq-698-H and Eq-708-J may be amended by interlineation.

No. 7984.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

ARMOUR & COMPANY, a corporation,

Appellant,

vs.

NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant:

GIBSON, DUNN & CRUTCHER, Esqs.,
J. C. MACFARLAND, Esq.,
Banks Huntley Building,
Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney,
CLYDE THOMAS, Esq.,
Assistant United States Attorney,
Federal Building,
Los Angeles, California.

United States of America, ss.

To NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14th day of October, A. D. 1935, pursuant to order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled ARMOUR & COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant, wherein Armour & Company is appellant, and you are appellee to show cause, if any there be, why the

.....

.....

in the said.....mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 14th day of Sept, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth

Paul J. McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Receipt is hereby acknowledged of a copy of the within Citation on Appeal this 16th day of September, 1935. Peirson M. Hall, United States District Attorney. Clyde M. Thomas, Assistant United States District Attorney, By Peirson M. Hall, D. H. attorneys for defendant. Filed Sep. 16, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

* * * *

ARMOUR & COMPANY, a corporation, Plaintiff, v. NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 740-C In Equity BILL OF COMPLAINT AND PETITION FOR INJUNCTION

* * * *

The plaintiff, Armour & Company, a corporation, brings this, its bill of complaint, against the defendant, Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, and for grounds of complaint the plaintiff says:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and has its principal office and place of business in the City of Chicago, State of Illinois; that also it is qualified to do business in the State of California and has an office and place of business in the City of Los Angeles, State of California, within the said Sixth Collection Dis-

trict of California and within the Southern Judicial District of the State of California.

II.

That the defendant, Nat Rogan, is the duly appointed, qualified, and acting Collector of Internal Revenue for the said Sixth Collection District of California and is a citizen of the United States of America and of the State of California and resides in the City of Los Angeles, County of Los Angeles, State of California and in the Sixth Collection District of California and in the Southern Judicial District of California.

III.

That this is a suit of a civil nature arising under the constitution and laws of the United States of America, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00).

IV.

That the plaintiff is, and has been since its organization, engaged in the business of slaughtering animals, including hogs, and packing and selling meat products, and that plaintiff owns and operates slaughtering houses and packing plants in the State of New Jersey and leases and operates a slaughtering house and packing plant in the City of Los Angeles, State of California, and in other cities; that the meat products manufactured and produced by the plaintiff, including those from the processing of hogs, are sold and dealt in by it in foreign, intrastate, and interstate commerce; that the slaughtering and processing of hogs is a business of intrastate character exclusively, being performed in its entirety within the limits

of the states wherein the plaintiff's plants are respectively established and operated.

V.

That there was adopted by the 73rd Congress and approved, May 12th, 1933, an Act, P. L. No. 10, popularly known as the "Agricultural Adjustment Act", but officially entitled:

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes."

and that said Act, for convenience hereinafter, will be referred to by its popular title, namely, the Agricultural Adjustment Act.

VI.

That the policy, to be effectuated by the enactment of said Act, was declared, by Congress, in Section 2, to be:

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the pre-war period, August 1900-July 1914. In the case of tobacco, the base period shall be the post-war period, August 1919-July, 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period, August 1909-July 1914."

That in pursuance of and for the purpose of effectuating the declared policy, the Act established as its dominant and essential feature a scheme whereby the Secretary of Agriculture was given extensive powers to reduce and control agricultural production, and thereby enhance agricultural prices, which scheme is in substance as follows:

(1) The Secretary of Agriculture was empowered by Section 8 (1) to provide for reduction in the acreage or in the production for market, or both, of any of the enumerated agricultural commodities, which were designated as basic, through agreements with producers or by other voluntary methods;

(2) By the same section, the Secretary was empowered to provide for rental or benefit payments in connection with such agreement, that is, to make rental or benefit payments to the producers who sign such agreements to reduce acreage or production, "in such amounts as the Secretary deems fair and reasonable";

(3) By Section 9 the Secretary was empowered, whenever he determined that rental or benefit payments should be made with respect to any basic agricultural commodity,

so to proclaim and thereby put into effect from and after the beginning of the marketing year for the commodity next following such proclamation, a so-called processing tax levied upon and collectible from the processors of such commodity on account of the first domestic processing of such commodity.

(4) By Section 9 the Secretary was empowered to determine and fix the rate of the processing tax, but it was provided that the tax should be at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity", which is defined to be the "price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the based period," i. e., August, 1909 to July, 1914. But, if the Secretary should find that the tax at such rate would cause such a reduction in the quantity of the commodity or products thereof, domestically consumed, as to result in the accumulation of surplus stocks of the commodity or products thereof, or in the depression of the farm price of the commodity, then the processing tax should be at such rate as would prevent such accumulation of surplus stocks and depression of the farm price of the commodity.

(5) By Section 9 the Secretary was empowered to determine when rental or benefit payments and the processing tax in respect to a basic agricultural commodity should terminate.

(6) By Section 11, hogs, among other commodities, were included in the expression "basic agricultural commodity," and the Secretary of Agriculture is given power to exclude any such commodity from the operation of the statute if he finds, after notice and hearing, that the

policy of said Act, with respect to such commodity can not be carried out because of conditions of marketing production or consumption, thereby giving to said Secretary power to establish a price differential in favor of commodities which compete with pork products.

(7) By Section 12 the proceeds from the processing taxes were appropriated in advance for the payment of rental and benefit payments, the cost of administering the Act, refunds of processing taxes and for certain other general purposes of the Act, and no other appropriation for the rental of benefit payments has ever been made by the Congress.

VII.

That Section 9, paragraphs (a), (b), and (c) of said Act provide, in part, as follows:

"(a) * * * When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; *. * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such require-

ments. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity."

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that any such result will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stock and depression of the farm price of the commodity."

"(c) * * * * the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in Section 2 (August 1909-July 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

VIII.

That, in addition to the above enumerated powers, which constitute the chief plan and design of the Act, there were vested in the Secretary of Agriculture by the Act certain incidental powers, to wit:

(1) The power to enter into marketing agreements with processors, association of producers, and others engaged in the handling in the current of interstate or foreign commerce of any agricultural commodity or product thereof;

(2) The power to issue licenses permitting processors, associations of producers and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or products thereof, to fix, within certain broad limits, the terms and conditions of such license and to revoke or suspend any such license for violation of the terms or conditions thereof.

(3) To make, with the approval of the President, regulations to carry out the powers vested in the Secretary by the Act and to fix the penalty for the violation of any such regulation not exceeding $100 in amount.

IX.

That, by virtue of the supposed authority conferred upon him by the said Act, the Secretary of Agriculture has made the following determination and orders in regard to hogs, one of the basic agricultural products named in the Act, viz:

(1) A proclamation, as of August 17th, 1933, that benefit payments were to be made with respect to hogs.

(2) A determination from statistics of the Department of Agriculture, that the difference as of Nov. 5th, 1933,

between the current farm price of hogs and the fair exchange value was $4.21 per cwt. live weight.

(3) A determination, after a hearing held in Washington on Sept. 5th, 1933, that the imposition of a processing tax of $4.21 per cwt. live weight would result in an accumulation of surplus stocks of hogs, or the products thereof, or the depression of the farm price of hogs, and that the following rates of the processing tax would prevent such results:

50¢ per cwt. live weight, effective as of Nov. 5th, 1933;

$1.00 per cwt. live weight, effective as of Dec. 1st, 1933;

$1.50 per cwt. live weight, effective as of Jan. 1st, 1934; and

$2.00 per cwt. live weight, effective as of Feb. 1st, 1934.

(4) A determination as of Dec. 21st, 1933, that adjustment of the rate of the tax was necessary and that as of Jan. 1st, 1934, the tax should be $1.00; as of Feb. 1st, 1934, $1.50; and, as of March 1st, 1934, $2.25 per 100 lbs. live weight, which rates, according to the Secretary, would prevent the accumulation of surplus stocks and the depression of the farm price of hogs.

X.

That, as a result of these determinations and orders, a processing tax in respect to hogs became effective Nov. 5th, 1933, and has continued and is now in effect and that the rate of said tax for each cwt. live weight has been, from time to time, as follows:

50¢ from Nov. 5th, 1933 to Dec. 1st, 1933.

$1.00 from Dec. 1st, 1933 to Feb. 1st, 1934.

$1.50 from Feb. 1st to March 1st, 1934.

$2.25 from March 1st, 1934 to the present time, and such rate is now in effect.

That plaintiff is informed and believes and therefore, upon such information and belief, charges the fact to be that the Department of Agriculture has to date collected over $866,000,000 in all processing taxes and has disbursed the same amount pursuant to the terms of said Act and that future processing taxes intended to be collected and disbursed will amount to over $360,000,000 per annum.

XI.

That, under the supposed authority of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and collected by the defendant from, the plaintiff a processing tax at the rate prevailing at the time of collection on all hogs slaughtered by plaintiff at the plant operated by it as lessee in the City of Los Angeles, State of California, since January 19, 1935, and that the amounts of such tax assessed against and collected from the plaintiff by months on all hogs so slaughtered by it (a calendar month being the period for which the tax must be returned and paid) are as follows:

Month	Year	Total
January	1935	$11,048.69
February	1935	19,477.48
March	1935	17,362.28
April	1935	18,507.91
May	1935	21,624.35
		$88,020.71

XII.

That under the terms of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and there is now claimed to be due from the plaintiff processing tax for the month of June, 1935, in the amount of $15,789.69 on account of hogs slaughtered by the plaintiff at the said plant operated by it as lessee in the City of Los Angeles, State of California; that the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, is charged with the duty of collecting said tax; that under applicable statutes and regulations of the Treasury Department, if the plaintiff does not make the said payment, the said Collector will serve upon the plaintiff notice and demand, and plaintiff will be allowed ten days from the receipt of such notice and demand within which to pay said tax and in the event of failure to pay within said time, defendant will assert against plaintiff a penalty equal to five per centum of the amount of the tax and interest on the tax at the rate of one per centum a month from the due date of the tax until it is paid; and that in the event plaintiff fails to pay said tax within ten days after receipt of said notice and demand defendant will proceed to collect the tax, penalty and interest by filing a notice of lien upon all of plaintiff's property and distraining upon and selling such of plaintiff's property as may be necessary in order to realize the amount of said tax, penalty and interest; that additional processing tax for months subsequent to June, 1935, will accrue and will be assessed against and collected from plaintiff, just as the processing tax for the month of June will be, in the manner described, unless the defendant is restrained and enjoined from asserting and collecting said taxes.

XIII.

That there are now pending before the Congress certain amendments to said Act, some of which have been adopted and passed by the House of Representatives and others of which have been adopted and passed by the Senate; that the purpose and effect of said amendments was explained in the report (No. 1011, to accompany H. R. 8492) of Mr. Smith for the Committee on Agriculture and Forestry, to be, among other things, a withdrawal by the United States of the right of a taxpayer to sue for refund in the event that said Act be declared unconstitutional, on the assumption that the tax has been passed on to the consumer, said report being quoted in part in Exhibit A hereto.

XIV.

That the theory and effect of said Act, in particulars here relevant, are explained in official publications issued by the Department of Agriculture, Agricultural Adjustment Administration, attached as Exhibit B hereto, wherein it is stated that "Who pays the processing tax depends on the supply and demand conditions for a given commodity" and that, under varying conditions the tax is borne by producer, processor and consumer, in varying and fluctuating amounts.

XV.

That the plaintiff is not able to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture and also the existing processing tax of $2.25 for each 100 pounds live weight of hogs purchased by it; that more than fifty (50) separate and distinct products result from the processing of a hog, all of which products are sold by the plaintiff; that, because of the

nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for the plaintiff or for any one else to ascertain what portion of the processing tax, payable because of the processing of any 100 pounds live weight of any hog, is assignable to the products resulting from such processing, in that in the normal course of business of the plaintiff, a hog is purchased on a given day, is processed the same or the next day and the products are sold as individual pieces from ten days to four months later, during which time the market prices at which such products are sold have been constantly and daily fluctuating; that said processing taxes paid and to become due and payable by plaintiff under said Act cannot be recovered or recouped by it as a result either of adding said tax to the product or of subtracting the said tax from the price paid to the raisers of hogs, for the reason that hogs are bought and pork products are sold in competitive markets; that the price at which pork products can be sold in the market is determined, not only by competition from other packers, but also by competition which other food products give pork, by consumer demand and by the price which the consumer will pay.

XVI.

That the supposed standard or formula established by said Act as a supposed guide to the Secretary of Agriculture is, in fact, non-existent and a mere mental concept subject to unlimited variation by arbitrary selections of articles and grades or averages of grades of articles which undisclosed individuals think farmers buy, and of grades and weights or averages thereof of articles taxed; of markets in which said articles and grades are dealt; by choice between high, low and average prices for days,

weeks, months, or averages thereof; and by a purely arbitrary determination by collectors of statistics as to whether or not any price or all prices should be weighted for volume of trade.

That said processing taxes are not taxes in any constitutional sense but are merely a means and devise whereby the intrastate production of products resulting from processing may be controlled, limited and increased at will by the Secretary of Agriculture; that numerous suits have been instituted by competitors of plaintiff and numerous injunctions have been issued by other courts protecting said competitors against assessment and collection of such processing taxes and if plaintiff be not granted similar relief, it will be at a disadvantage, competitively, in conducting its business; that the plaintiff's losses from the processing of hogs have been directly increased as a result of the effect of said processing taxes and that the plaintiff is no longer justified in acquiescing, by the payment of said taxes in the expectation of refunds, in experiments with its capital.

XVII.

That the said Agricultural Adjustment Act, and the provisions thereof for the levy of the processing taxes, is unconstitutional and void for the following reasons:

(1) The said Act enacted a scheme designed to regulate and control the production of hogs, corn, cotton and certain other agricultural commodities specified in the Act, and the so-called processing taxes imposed by the Act are an integral part of the scheme of regulating and controlling the production of such commodities. The regulation and control of the production of such commodities is not within the scope of any of the powers vested in the Congress by the Constitution, and is, therefore, within the

powers reserved to the States as expressly provided by the 10th Amendment to the Constitution;

(2) The so-called processing taxes were not imposed under or in conformity with the power vested in the Congress by Section 8, Article 1 of the Constitution to levy and collect taxes, duties, imposts and excises in that they were not imposed to pay the debts or to provide for the common defense or the general welfare of the United States, but were imposed for the benefit of a particular class of individuals, namely, the producers of the various specified agricultural commodities who conform to the conditions laid down in the Act;

(3) Said Act violates the 5th Amendment to the Constitution since the so-called processing taxes constitute the deprivation of the property of one class of citizens, namely, the processors of the specified commodities, without due process of law, in that such processing taxes constitute the taking of the property of this class of citizen, not for a public purpose but for a private purpose, to-wit, the payment of gratuities or bounties to another class of person, namely, the producers of the designated agricultural commodity, and particularly since this taking is without just compensation.

(4) Said so-called processing taxes levied under the Act are taxes only in name and not in fact. They constitute merely an exaction or imposition by Government for the purpose, not of raising revenue for support of the government, but of raising prices for farm products and adjusting farm income.

(5) Said Act further violates the Constitution since it makes a delegation of legislative power to the Secretary of Agriculture without the fixing of clear and adequate standards, in the following particulars:

Congress has illegally delegated to the Secretary of Agriculture the power to initiate the tax, to determine the commodities taxed, to terminate the tax, to fix the tax rate, to fix the amount of rental and benefit payments, to expend the proceeds of the tax; and that Congress has otherwise illegally delegated its authority, and the exercise of such power by the Secretary of Agriculture conflicts with the separation of powers into the three departments of government made by the Constitution.

(6) Said act delegates to an administrative officer legislative powers conferred exclusively on Congress by Article 1, Section 1; Article 1, Section 8, Clause 18; Article 11, Section 1; Article 1, Section 7, Clause 1; and Article 1, Section 9, Clause 7 of the Constitution of the United States, by giving said Secretary the right (1) to select the basic agricultural commodities to be taxed; (2) to fix the rate and change the rate of said tax (3) to determine the duration of same; (4) to make exceptions and exclusions from the operation of said tax, and (5) for other reasons.

(7) The power of said Secretary to pay out the proceeds of said taxes without any appropriation by Congress violates Article 1, Section 9, Clause 7, of the U. S. Constitution and the Fifth Amendment thereto, because no basis of fact or specific findings are required to be found by said Secretary to impose the said tax and no judicial review is provided.

(8) The said taxes, if construed as directed, violate Article 1, Section 9, Clause 4, and Article 1, Section 2, Clause 3 of the Constitution of the United States, because not apportioned according to population.

(9) The said taxes are not excise taxes and are not uniform throughout the United States, as required by Article 1, Section 8, Clause 1.

(10) The said alleged taxes cannot be levied under Article 1, Section 8, Clause 3, regulating commerce; that the production of commodities is not interstate commerce and cannot be regulated by Congress.

XVIII.

That on June 18, 1935, there was passed by the House of Representatives of the United States a Bill (H. R. 8492) entitled "A Bill to Amend the Agricultural Adjustment Act, and for other purposes," containing a provision adding to the Agricultural Adjustment Act a new section designated "Section 21," the relevant portions of which read as follows:

"Sec. 21. (a) No suit or proceeding shall be brought or maintained in, nor shall any judgment or decree be entered by, any court for the recoupment, set-off, refund, or credit of, or on any counterclaim for, any amount of any tax assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment. Except pursuant to a final judgment or decree entered prior to the date of the adoption of this amendment, no recoupment, set-off, refund, or credit of, or counterclaim for, any amount of any tax, interest, or penalty assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment shall be made or allowed. The provisions of this subsection shall not apply to (1) any overpayment of tax which results from an error in the computation of the tax, or (2) duplicate payments of any tax, or (3) any refund or credit under subsection (a) or (c) of section 15 or under section 17.

(b) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claims pursuant to the provisions of law made applicable by section 19 may be reserved in the court's order."

That said Bill was sent to the Senate of the United States, where the said Section 21 was altered and modified to read as follows:

"No recovery, recoupment, setoff, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue, or in the case of a judicial proceeding establishes in such proceeding (1) that he has not included such amount

in the price of the article with respect to which it was imposed, or of any article processed from the commodity with respect to which it was imposed, that he has not collected from the vendee any part of such amount, and that the price paid to the producer was not reduced by any part of such amount, or (2) that he has repaid such amount to the ultimate purchaser of the article, or in case the price paid to the producer was reduced by such amount, to such producer; nor shall any judgment or decree be entered by any Federal or State court for damages for the collection thereof, unless the claimant establishes the foregoing facts, in (1) or (2) as the case may be, in addition to all other facts required to be established. * * * * * "

XIX.

That, in the event that the said Bill amending the Agricultural Adjustment Act, as set forth above, is in either form enacted by Congress and becomes a law, the plaintiff will have no adequate remedy at law to sue for the refund or processing taxes or to litigate before this court or any other tribunal the question of the legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of processing taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them, in that said Senate modification imposes onerous conditions which cannot be complied with because the facts are incapable of ascertainment; that the purported right to sue for a refund for the amount of tax not passed on is purely illusory in that an error in computation of one (1¢) cent in the amount claimed will result in the loss and forfeiture of

the entire amount, even though said amount be several million dollars; that the prices of hogs processed by plaintiff and of the products dealt in by plaintiff are set by competition, in open and free markets, said prices fluctuating daily and in some cases hourly and the ascertainment of the part of any processing tax not passed back to the producer or on to the consumer is an impossibility.

XX.

That there is now pending before Congress H. J. Res. 348, section 2 of which provides:

"Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever heretofore or hereafter commenced, upon any bond, note, certificate or indebtedness, Treasury Bill, or other similar obligation for the repayment of money or for interest thereon made, issued, or guaranteed by the United States or upon any coin or currency of the United States or upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver, is withdrawn."

Thus if said joint resolution be passed subsequent to the enactment of any amendment to said Act purporting to reserve to a taxpayer the right to sue for a refund, the plaintiff asserts that, because of the broad language used in said joint resolution, it may be construed to withdraw any such right, in which event, the plaintiff will be remediless if said joint resolution be constitutional.

XXI.

That the amount of processing tax payable by plaintiff on account of hogs slaughtered at its said Los Angeles plant for the month of June, 1935 is $15,789.69, and that plaintiff shortly will receive from the defendant a demand in writing that plaintiff pay said amount to defendant; that if such amount be not paid, said statute provides that a penalty of five per cent (5%) be added to said amount and that interest be added at the rate of one per cent (1%) per month thereafter; that plaintiff can not incur the risk of non-compliance with said demand, in the absence of injunctive relief, because, in addition to imposing said penalties and interest, defendant will attach, distrain, or levy on the property of plaintiff, thereby irreparably injuring its business, good-will, and credit, and subjecting it to a multiplicity of suits; and plaintiff believes and therefore states that processing taxes for the month of July, 1935, and thereafter will exceed the sum of ten thousand dollars ($10,000.00) per month.

That, if plaintiff fails to pay said processing taxes when due, it and its officers will be subject to heavy criminal penalties as provided in Section 1114 (a) of the Revenue Act of 1926 (44 Stat. 116; U. S. C. Title 26, Sec. 1265) and Section 19 (g) of said Agricultural Adjustment Act as amended, unless protected therefrom by the injunctive process of this Court.

XXII.

That, aside from the invalidity of the said Act, the processing taxes which have been assessed and collected since January 19, 1935, were and the processing tax which is now being asserted against the plaintiff is, erroneous and illegal in that the rate of the tax since January 19,

1935, has not conformed and does not now conform to the alleged standard or formula which Congress laid down in the Act for the determination of the rate and that such rate exceeds the lawful rate which should be applied in accordance with said alleged standard or formula; that in said Act it is provided that the rate of the processing tax shall equal the difference between the current farm price for the commodity and the fair exchange value of the commodity and that the Secretary of Agriculture shall adjust the rate from time to time to conform to such alleged standard or formula; that the prevailing rate of the processing tax, to-wit: $2.25 per cwt, now exceeds and has exceeded since January 19th, 1935, the difference between the current farm price and the fair exchange value as calculated from statistics compiled by the Department of Agriculture; that the alleged fair exchange value of hogs, the alleged current farm price for hogs, and the excess of the alleged fair exchange value over the alleged current farm price as so calculated are as follows:

1935	Alleged Fair Exchange Value or Pre-war Parity Farm Price for Hogs	Alleged Farm Price for Hogs	Excess of Pre-war Parity of Alleged Farm Prices Over Alleged Actual Prices
January	$9.10	$6.87	$2.23
February	9.17	7.10	2.07
March	9.17	8.10	1.07
April	9.17	7.88	1.29
May	9.17	7.92	1.25
June	9.17	8.36	0.81

and that the defendant will continue to collect the processing tax at the illegal rate of $2.25 per cwt. from plaintiff under threat of distraint of plaintiff's property unless he is enjoined therefrom by this Court.

XXIII.

The plaintiff is ready, able and willing, and hereby offers and agrees that in the event the injunctive relief herein prayed for is granted, it will deposit, at such time and in such manner as this Court shall direct, the said sums claimed to be due from the plaintiff for processing taxes assessed against it for the month of June, 1935, and the plaintiff further offers and agrees that at the end of each month hereafter it will file processing tax returns with the defendant as required by existing laws and regulations and that as and when processing taxes under said returns become due and payable according to existing laws and regulations or any extension lawfully granted to the plaintiff, it will deposit the amount of such taxes in such manner as the Court may direct, all such deposits to abide the final decree in this cause.

WHEREFORE, plaintiff being without a plain, certain and adequate remedy at law and being able to obtain relief only in a court of equity, prays:

(1) That a writ of subpeona be issued to the defendant requiring him to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived;

(2) That a temporary, as well as preliminary, injunction be issued and granted by the said Court to the plaintiff against the defendant, after notice and hearing if

required by said Court, enjoining the defendant until the final hearing of this cause or until further order of this Court from collecting or attempting in any manner to collect from the plaintiff, whether by lien or notice of lien or jeopardy or other assessment, any processing taxes under or pursuant to the said Agricultural Adjustment Act, and any interest or penalty on account of plaintiff's failure to pay any such processing tax; from levying upon or distraining, or in any way, interfering with the manufacturing plant, inventory, cash on hand, bank account or other property of the plaintiff on account of the nonpayment of said processing taxes now due or hereafter to become due in accordance with the terms and provisions of the said Agricultural Adjustment Act; and from hereafter enforcing or collecting or attempting to enforce or collect any penalties against the plaintiff for the nonpayment of said taxes from the date of the issuance of the said temporary injunction until the final decree of this Court in this cause;

(3) That, on the final hearing of this cause, the said Agricultural Adjustment Act entitled

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes"

and the Acts amendatory thereof, and supplemental thereto, be declared unconstitutional and void as violative of the Constitution of the United States and that the defendant be permanently enjoined and restrained from

enforcing the same and from collecting or attempting in any manner to collect processing taxes or penalties against the plaintiff pursuant to the terms of said Act;

(4) And the plaintiff prays for all other relief agreeable to equity and good conscience.

GIBSON, DUNN & CRUTCHER,

By: J. C. MacFarland

Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

G. M. COCKLE being by me first duly sworn, deposes and says: that he is the Vice-President of ARMOUR & COMPANY, the plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint and Petition for Injunction and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

G. M. COCKLE

Subscribed and sworn to before
me this 2nd day of August, 1935.

Mary S. Alexander (Seal)
Notary Public in and for the County
of Los Angeles, State of California.

EXHIBIT A.

REPORT NO. 1011.

"The sections of the bill which deal with the imposition of processing taxes have been altered in several important particulars. These taxes, while levied upon processors, have been passed on to the consumer and actually paid by him. Consequently it has been found desirable to guard against the possibility of recovery of taxes accrued to or paid by the processors prior to the date of the adoption of these amendments, should such taxes for any reason be held invalid, by withdrawing the consent of the United States to be sued, and withdrawing jurisdiction from all courts to entertain such suits. * * *

The declaration of policy in the Agricultural Adjustment Act has as its objective the reestablishment of prices paid to farmers at a level that will give agricultural commodities a current purchasing power equivalent to that of the base period. Section 1 (a) of the bill amends this provision of the act to provide that in the case of all commodities for which the base period is the pre-war period (August 1909 to July 1914), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This provision is intended to give the Agricultural Adjustment Administration a more adequate standard for determining parity prices. The present

method of calculation is composed of an index of prices for goods which farmers buy in relation to the pre-war level and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160 to 170 per cent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers, may be expected to give parity standards approximately 5 percent higher than at present * * * *

"Before exercising any of the powers granted with respect to any commodity, the Secretary must determine that the current average farm price of the commodity is, at the time of such determination, below the fair exchange value thereof, or that the average farm price of the commodity for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, is likely to be less than its fair exchange value. The Secretary must undertake an investigation concerning the existence of these circumstances whenever he has reason to believe that they exist. If he finds, upon the basis of the investigation, that they do exist, he is directed to undertake the exercise of such of the powers conferred by section 8 as are administratively practicable and best calculated to effectuate the declared policy. The Secretary is directed to cease exercising such powers after the end of the marketing year current when he determines, after investigation, that the circumstances described above no longer exist, except (as provided in the committee amendment) insofar as the exer-

cise of any of such powers is necessary to carry out obligations assumed by him prior to his proclamation discontinuing the exercise of the powers * * * *

"Section 9 (b) of the present law also contains a provision allowing the Secretary of Agriculture, when he finds that the effect of the tax is to cause such a reduction in domestic consumption as to cause an accumulation of surplus stocks of a commodity or its products, or a depression in the farm price, to set a rate which will prevent such consequences. Although it is clear that Congress intended to provide for such a reduction in the rate of tax even when the existing rate is higher or lower than the difference between the current average farm price and the fair exchange value, or in the event that these circumstances continued even after one such reduction, the langauge at present used does not explicitly state that such adjustments are permissible. The proposed amendment to section 9 (b) expressly authorizes reductions under these circumstances, and also empowers the Secretary to increase a rate of tax which has been theretofore reduced. An increase in rate is, of course, contingent upon the Secretary's finding that such increase will not cause a recurrence of stock accumulations or price depressions. After such a finding the processing tax is to be at the highest rate which will not cause such accumulation of stocks or depression in price, but it cannot be higher than the difference between the current average farm price and the fair exchange value."

EXHIBIT B.

(a) "Achieving a Balance Agriculture," issued August, 1934:

"CHAPTER VIII—PROCESSING TAXES; WHAT FOR AND WHO PAYS THEM?

"By the end of March, 1934, the Agricultural Adjustment Administration had disbursed a total of $179,702,-687. By the end of 1935 it anticipates a total disbursement of about $840,000,000.

"Where is the money coming from?

"The adjustment program is being financed largely by the receipts from processing taxes, collected by the Bureau of Internal Revenue from the first domestic processor of each of the basic commodities—the miller, the cotton textile manufacturer, the meat packer, and so on. As was mentioned in Chapter VI, in the consumer's interest the tax was limited by law to the amount necessary to raise the current farm price of the commodity to the 'parity' price.

"In some cases, where the application of the full amount of such tax would cut down consumption and therefore pile up new surpluses, the Secretary of Agriculture is permitted to fix the tax at a lower level. This has been done in connection with the corn-hog program.

"Since the prices of competing commodities largely determine how much of each will be bought, the Secretary also is allowed to place compensating taxes on commodities whose use is likely to replace that of commodities bearing a processing tax. Compensating taxes are now being levied on jute and paper where they come into competition with

cotton. Similar taxes are permitted on imported articles so as to maintain the usual competitive relationship between the use of imported and domestic goods.

"Who pays these taxes?

"Do the miller, the textile manufacturer, the packer, pay them?

"Do they pass them forward to the consumer?

"Or do they pass them back to the producer?

"SUPPLY AND DEMAND CONDITIONS GOVERN

"Who pays the processing tax depends on the supply and demand conditions for a given commodity.

"Demand for a product may be either elastic or inelastic. It is inelastic when about the same amount of the product is bought, no matter whether the price is high or low. It is elastic when a rise in price is immediately followed by a drop in quantity sold.

"When demand is inelastic, the processing tax is likely to be paid by the consumer, since he will continue to buy even if the whole tax is added to the price of the goods.

"When demand is elastic, on the other hand, the consumer may pay less than the full amount of the tax if the same quantity of the product is put upon the market as before. In such cases, the producer and the distributor each try to make the other absorb the tax; while supplies continue to be excessive, it is more likely to be passed back to the producer in the form of prices lower than they would be if shipments were smaller.

"Experience with the processing taxes seems so far to indicate that in the case of cotton goods and of wheat

flour the tax has been consistently paid by the consumer. This is partly because both are nonperishable commodities which can be stored and thus do not have to be thrown upon the market as soon as they are produced; partly because they are sold abroad as well as at home, which means that demand from abroad tends constantly to bolster the price at home with domestic prices almost always related to world prices; and partly because they are regarded by the public as necessities and hence domestic demand for them is highly inelastic.

"EFFECT OF TAX ON HOG PRICES

"In the case of hogs, on the other hand, the effect of the tax has been varied. Three distinct periods are noticeable between October 1933 and May 1934. Demand for pork is highly elastic. Consumers buy a great many pounds of pork products if prices are low, and correspondingly fewer pounds as prices rise, so that the annual amount spent on it by the public remains just about the same. In view of this, the processing tax has been applied gradually, beginning at 50 cents per hundred pounds live weight in November 1933 and rising to $2.25 in March, 1934.

"From October to January, the farmer was shipping a very large supply which the consumer would not have accepted had the prices been put up too much. Price-raising effects of the Administration's emergency hog-buying program, which eliminated over 6 million pigs and light hogs from the farms during the autumn, were not

felt during that period because those pigs, if left on the farm, would not have been sold until later. During those months, many farmers assumed that they themselves were paying part of the tax, but in no case has it ever been contended that they paid all of the tax. Such a situation is very different from the McNary-Haugen plan for raising prices, under which the farmer would have paid all of the cost of contributing the equalization fee.

"After January 1934, the elimination of the pigs began to be felt; the curtailed supply turned a buyers' market into a sellers' market, and from January to March the tax appeared to be generally paid by the consumer. Prices to farmers showed a distinct rise, from $3.06 per hundred pounds on January 15 to $3.88 on March 15.

"By the end of March, the supply situation began to reverse itself; as shipments increased, prices to farmers declined again, with a pronounced drop in price when an unusual number of shipments were forced on the market by the drought.

"Twice, during the days immediately following the raising of the tax on the first of February and on the first of March, the packers absorbed a part of the tax, for they were unable to raise wholesale prices of pork as fast as the price of hogs plus tax was going up. Thus during most of the period after processing taxes were levied, farmers received more than they did in the corresponding period a year before in price alone, and, in addition, they got their benefit payments.

"TAX MONEY ENDS UP IN FARMERS' POCKETS

"But, from one point of view, the question of who pays the tax is beside the point. Even if it could be shown that the farmer pays part of the tax, that would not in itself mean that the farmer is not gaining great advantage from it. If there were no tax, there could be no benefit payments. If there were no benefit payments, no plan for voluntary control of production would be feasible. If there were no control of production, supplies would be excessive and prices would continue at ruinously low levels.

"The farmer who thinks he is paying part of the tax should do some figuring. He should figure what price he would be getting if there were no adjustment program. Then he should figure what his total cost of production would be if he were making no reduction in the number of pigs raised, take that figure from his total income and thus get at his net return if he were not operating under the program. He should compare these figures with his situation under the adjustment program. He would find that three factors are contributing to his total income—his volume of production, his market price, and his benefit payment. He should subtract from this total income his cost of production, which will be less in proportion as his production is less. He can then see the difference between his net return under the program and what his net would be if there were no program.

"Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every

dollar collected in processing taxes goes to the farmer in benefit payments. In addition his market price is higher due to production adjustments. Except for money spent to remove surpluses from the market, the cash is sent straight to the farmers forming the county production control associations.

"What counts, after all, is not who pays the tax but who gets the income from it and who gets the advantage of the whole program.

"CONSUMERS' PRICE INFORMATION PUBLISHED

"Are the processing taxes ever paid more than once?

"Whenever any tax is levied there is always a danger that in the course of being passed on it may be piled up or pyramided, so that the ultimate consumer has to cover it several times. There is the possibility that retailers may reap excess profits under the excuse that the tax is forcing prices up.

"In order to prevent this and other abuses of the consumer in the case of processing taxes, a Consumers' Counsel has been established in the Agricultural Adjustment Administration. This office issues a semi-monthly bulletin called the Consumers' Guide, which follows price movements and the elements which make them up, so that the consumer may know just how much the tax really does add to the price he pays.

"The April 9, 1934, issue of the Consumers' Guide shows the part played by the processing taxes in prices of clothing, bread, and so on. According to the Consumers' Counsel's figures, the tax does not directly represent more than one-half cent in the 7.9 cent average price of

a one-pound loaf of bread. It does not directly represent more than 3.4 cents in the price of a woman's cotton dress, nor more than 6.2 cents in the price of a man's work pants. It does not directly represent more than 7.6 cents in the price of a sheet, 3.2 cents in that of a bath towel, or 1.3 cents in that of a yard of unbleached muslin. Further increases have been due to increased labor costs and other factors, but as these figures indicate, increases in prices directly due to the processing taxes alone are relatively small.

"SMALL PRICE RISE TO CONSUMER MEANS MUCH TO FARMER

"It is worth remembering that a small percentage rise in the consumer's price usually is accompanied by a much greater percentage rise in the farmer's price. This is because the farmer's share in retail price is usually very low and because costs of distribution usually remain about the same no matter what the price is. For example, if the consumer has been paying $1 for a bushel of potatoes, the farmer's share likely has been 35 cents. If the price paid by the consumer rises to $1.10, the farmer receives 45 cents instead of 35 cents. The increase in his price is 29 percent, while the consumer pays only 10 percent more. If the consumer pays $1.35 a bushel, the farmer will receive 70 cents, or double his former price, while the consumer's price has increased only 35 percent.

"Something like this is what happened during 1933 with respect to wheat. In March 1933, the consumer paid an average of 3 cents a pound for flour, of which the farmer got only 0.8 cent. In March 1934, the consumer

paid an average of 4.8 cents a pound, of which the farmer got 2.3 cents.

"A moderate decrease in the consumer's price may almost wipe out the farmer's margin, as it did in wheat early in 1933. Conversely, a moderate increase in what the consumer pays, such as occurred later in 1933, may change the farmer's prospects from ruin to a chance to make a reasonable living.

"PROGRAM DEPENDS UPON TAX

"From what has been said above, it will be clear to what extent the voluntary production control programs depend on the processing taxes. It will be seen that the tax has a double function: It not only supplies the funds which are being used to increase the co-operating farmers' income; it is the essential instrument by which production control is secured.

"In a sense, the processing tax and benefit payment may be considered the farmer's tariff, calculated to place him on more equal footing with the protected industrialist producing goods bought by farmers. Because large portions of our farm crops are ordinarily sold at world prices, import duties give little protection to the producers of these crops. As long as the United States maintains a high tariff protecting the prices of many industrial products which the farmer has to buy, the processing tax is needed to give an equal protection to the prices of the farm products which the farmer sells.

"Farmers who understand the manner in which the processing tax operates will be reluctant to abandon so practical and effective a means of gaining economic equality."

(b) "Corn-Hog Adjustment," issued January, 1935:

"INCIDENCE—WHO PAYS THE PROCESSING TAX?

"The processing tax may affect producers' income from corn and hogs in two general ways. Collection of the tax may operate to increase producers' income directly: (1) By causing consumers to pay more for the volume of products offered—possibly to the full extent of the tax rate—than they would pay if no tax were in effect; or (2) by causing processors and other in-between handlers to reduce to some extent the unit margins held out of the consumers' dollar for each pound or bushel of commodity handled. If either effect were produced the processing tax would tend to increase return from the commodity before any adjustment in production was made.

"Or collection of the processing tax may affect producers' income indirectly. Funds derived from the tax collections are used to provide benefit payments to producers who participate in adjustment of production. Under the adjustment program, supply is brought into better balance with effective demand and the value of the commodity tends to rise. Rising commodity values mean increased return to farmers. Although production adjustment itself is directly responsible for the increase in farmers' income in this case, the processing tax may be given credit indirectly because it provides the funds for the benefit payments. Without the benefit payments or some similar means of rewarding cooperating producers, there would not be general voluntary participation in the corn-hog programs.

"It is not easy to make a thorough and accurate analysis of the actual effects of the processing tax to date on consumers' expenditures, handlers' margins, or return to producers, particularly with respect to hogs, because of day-to-day and week-to-week variations in hog marketing, changing trends in consumers' incomes and fluctuations in other factors affecting market value of farm commodities. It is easy to be misled by changes in the market value of corn and hogs, which are due to other things than the collection of the processing tax.

"For example, a seasonal increase in hog marketings such as normally occurs in the early winter and late spring usually results in a proportionate decline in hog prices. If a processing tax were put into effect at such a time—as was the case with Hogs in November 1933—it could be rather persuasively argued that the tax had been responsible for the decline and that, therefore, producers were being made to "pay" the tax. This, however, might not be true. In spite of a temporarily lower price, the total money being paid by packers—the price for hogs and the tax on the right to slaughter—actually might be larger than normal with respect to the increased volume of hog marketings, and the cooperating farmer would receive the market price plus the benefit payments paid out of the proceeds of taxes.

"On the other hand, the opposite impression would result if a processing tax were put into effect during a seasonal decline in hog marketings, such as normally occurs in the early spring and late summer and which usually results in considerably stronger hog prices. That is, it would seem to show that the consumer was being made to spend more in total for hog products than before

and in effect, therefore, was being made to bear a part or all of the tax. However, this, too, might not actually be true in all respects.

"EFFECT OF PROCESSING TAX UPON PRODUCERS.

"How does the hog processing tax affect producers?

"Studies thus far indicate that the production adjustment program, the benefit payments, and the processing tax are resulting in substantially higher hog prices and in a larger total income. The increase thus far primarily reflects the adjustment in production effectuated by the emergency and supplemental purchase of hogs and hog products during the latter part of 1933 and early 1934. The 1934 corn-hog production adjustment program has only recently begun to affect hog marketings.

"It is sometimes argued that the producer pays the tax because he no longer gets, in the form of an open market price, all of the total amount paid by the processor for each hog slaughtered. This statement, however, has no real significance so long as the combined income from both the open-market price and the benefit payment is larger than before. To say that the producer pays the processing tax when farm income has been increased by a program financed by tax collections is to confuse the meaning of the word 'pay.'

"In a situation in which the producer paid the processing tax in the true sense, it would be found that the producers' total returns from the new production and sale of hogs would be less than if there were no adjustment-tax program and if no processing tax were in effect.

"Only the nonsigner who does not participate in the adjustment program can be said to sustain any disadvantage by reason of the processing tax. He does not share in the benefit payments made out of the proceeds of taxes. The nonsigner is benefited to some extent, however, by the rise in the open-market price which results from adjustment of production.

"What is the effect of the corn processing tax?

"The processing tax of 5 cents per bushel on field corn apparently is being absorbed largely by processors. The corn processing tax rate is nominal and applies only to the amount of corn processed in commercial and industrial channels. This amount is equal to about 10 percent of the annual corn crop.

"EFFECT OF THE PROCESSING TAX UPON CONSUMERS

"Does the consumer, in effect, pay the processing tax on hogs?

"This question should be divided into two questions if it is to be properly considered.

"Has production adjustment, which benefit payments have thus far encouraged, caused the usual increase in the retail price of pork and lard which in the past has resulted from a like change in supply? And, in addition, has the processing tax been handled by processors and distributors so as to cause a larger-than-usual increase in the retail price of pork and lard? That is, has the tax caused consumers to spend more for pork and lard than otherwise might have been spent for an identical adjusted supply on which no tax was in effect?

"Studies indicate that the adjustment in production under the Act has caused the retail price of pork and lard to increase to an extent which is about proportionate with the usual increase expected from a similar change in supply. After allowance for the increase in consumers' incomes during the past 2 years, studies show that the higher retail prices are fully reflecting smaller hog supplies and higher hog prices.

"It appears that consumers as a group are bearing the hog processing tax mainly in the sense that they are getting a more moderate supply of pork and lard for an expenditure which is proportionate with but not materially in excess of past total expenditures at a similar level of income. An individual consumer who is buying the same amount of hog products as formerly, of course, really is spending relatively more than before the adjustment in supply.

"The hog processing tax of $2.25 per hundredweight is the equivalent of an average of between 2½ cents and 6 cents per pound on the products from 100 pounds of live hogs, depending upon the cut and quality. The price equivalent of the hog processing tax represents a percentage of the total retail price on hog products that is larger than the percentage that the cotton and wheat processing taxes are, of the respective retail prices of wheat products and cotton goods. But this is because more in-between costs and margins enter into the processing and handling of wheat and cotton products than into the processing and handling of hog products. With respect to the open-market prices of the several unprocessed commodities, the wheat, cotton, and hog processing taxes all bear a similar relationship.

"EFFECT ON PROCESSORS AND OTHER HANDLERS

"Processors are the persons who actually pay the tax over to the Government out of the proceeds of their sales of products, but it is generally recognized that this does not necessarily mean that processors really bear the tax. If processors were paying the tax in the true sense, it would be found that their charges per hundred weight of hogs processed had been proportionately reduced with the imposition of the initial rate of the tax and with each increase thereafter. Thus at the present time, it would be found that processors' unit charges were smaller by an average of approximately $2.25 per hundredweight of live hog handled than before the tax was put into effect.

"A review of processors' gross margins since November 1933 indicates that while they have varied from month to month, these margins have widened to some extent with each increase in the tax rate. After the processing tax is subtracted from these gross margins, it appears that the average net margin on which the processor actually operates has tended to decline somewhat during the first marketing year the processing tax has been in effect. However, it cannot be definitely determined yet whether this is a temporary situation due to spirited bidding for hogs to put in storage in view of the short supply ahead or whether it is a more permanent result of the processing tax and other features of the agricultural adjustment program as it applies to corn and hogs.

"It is not expected, however, that the processors' net margin would absorb a large part of the tax, since this margin in total normally averages between $1.50 and $2.00 per hundredweight of hogs, live weight basis, as compared with the processing tax of $2.25 per hundredweight.

"PROCESSORS" GROSS MARGINS LESS

"When it comes to the aggregate of processors' margins, that is, unit margin times the supply of hogs handled, a reduction has taken place. It is this reduction which is reflected in an increase in the percentage of consumers' expenditures going to producers.

"In the case of handlers other than processors, such as transportation agencies and retail distributors, it appears that on the average, unit handling margins have tended to increase rather than decrease but that the increases which have occurred largely reflect increases in operating costs. Increases in unit margins have been offset to some extent by the reduction in the total volume of hogs and hog products handled.

"CONCLUSION

"Because the processing tax is instrumental in one way or another in raising food prices, it is liable to be regarded with considerable disfavor by those who take a short-time view of the desirability of cheap food regardless of whether farmers get a fair return. In the long run, however, the desirable price is that price which will

yield a fair return to the farmer, enabling him to continue to produce adequate supplies of agricultural products. If farming is a losing proposition over an extended period, eventually total production falls below a desirable level and consumers must then pay extremely high prices for food. Balanced production is important to the permanent welfare of consumers.

"Among producers there is a tendency to feel that if the processing tax were removed the open market price might be higher by at least a part of the tax and that the total income from hogs would be practically as large as when the tax was in effect. In the case of hogs, this might prove to be true for a time. However, without the processing tax or some other means of raising revenue, there would be no benefit payments and none of the price-raising effects which result from production adjustment. Without an adjustment program, hog production would be likely to increase to high levels again and both price and total income would fall."

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

To NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, and to his deputies, officers, servants, and agents:

WHEREAS, in the above named cause it has been made to appear, by the verified bill of complaint and petition of plaintiff filed herein, that a restraining order preliminary to hearing upon application for a preliminary injunction is proper because of the allegations of immediate and irreparable injury, loss, and damage set forth in said bill of complaint and petition, and that prima facie the plaintiff is entitled to an order restraining temporarily the said defendant, Nat Rogan, as Collector of Internal Revenue for said Sixth Collection District of California, and his deputies, officers, servants, and agents, from doing the acts therein complained of,

NOW, THEREFORE, on motion of the plaintiff, by its attorneys, IT IS ORDERED that said Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, appear before the District Court of the United States, Southern District of California, Central Division, before Honorable Paul J. McCormick, Judge of said Court, at his Courtroom, in the Federal Building in Los Angeles, California, in said District, on the 9th day of August, 1935, at the hour of 10 o'clock A. M. of that day, then and there to show cause, if any

there may be, why the preliminary injunction prayed for in said bill of complaint and petition and in said motion requested, should not issue.

IT IS FURTHER ORDERED that copies of this order certified under the hand of the Clerk and the seal of this Court be served upon defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and that such copies, together with said bill of complaint and petition, be served upon said defendant on or before the 5th day of August, 1935.

This order signed and issued this 3rd day of August, 1935, at 9:50 o'clock A. M.

By the Court.

PAUL J. McCORMICK
Judge

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION.

COMES NOW the defendant Nat Rogan as Collector of Internal Revenue for the Sixth district of California, in the above entitled cause, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, alleges:

I.

That the defendant is a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II.

That the duties of said defendant are to collect taxes levied under the Internal Revenue Laws of the United States.

III.

That the Complaint in the above entitled case seeks to enjoin the defendant from collecting taxes levied under and by the Internal Revenue Laws of the United States.

IV.

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the

purpose of restraining the assessment or collection of a federal tax.

V.

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI.

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

DATED: This 6th day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: Received copy of the within document Aug 6 1935 Gibson, Dunn & Crutcher Per A

Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

MOTION TO DISMISS

COMES NOW Nat Rogan, Collector of Internal Revenue for the Sixth District of California, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant U. S. Attorney for said District, and moves the Court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I.

That the Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complianant has a plain, adequate and complete remedy in the ordinary course at law.

II.

That the United States of America is a real party in interest and it may not be sued without its consent.

III.

That there is no actual controversy between complainant and defendant, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV.

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States, and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V.

That the proceeding attempted to be instituted by this complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 9th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, Collector, etc.	)	
Defendant.	)	

This cause coming on for hearing on Order to Show Cause, filed August 3rd, 1935, directed to Nat Rogan, Collector, to show cause why Preliminary Injunction prayed for in the Bill of Complaint should not issue, etc.; and, for hearing on Motion of defendant for an Order of the Court dismissing proceeding, pursuant to Notice filed August 6th, 1935;

J. C. McFarland, Esq., appearing for the Petitioner herein, makes a statement, following which Peirson M. Hall, U. S. Attorney, appearing for the Government, makes a statement, and Clyde Thomas, Assistant U. S. Attorney, also of counsel for the Government, argues to the Court, at this time, and Eugene Harpole, Esq., being present and appearing specially for the Bureau of Internal Revenue, the Court makes a statement, and orders Preliminary Injunction granted and Motion to dismiss denied. Exception noted.

[Title of Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard this 9th day of August, 1935, before Hon. Paul J. McCormick, Judge of the above entitled court, on the application of said plaintiff for a preliminary injunction upon plaintiff's verified complaint and petition for injunction, due notice of the hearing of which application was given to defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and on the written motion of defendant to dismiss the bill of complaint and petition for injunction; and after hearing counsel for the respective parties and the matters having been submitted to the Court for its consideration, and it appearing to the Court, and the Court finds that it is true, that certain processing taxes are due and payable from the plaintiff under the terms of said Agricultural Adjustment Act hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act, that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition, for the reason that there is immediate danger that said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, will proceed under said Act to collect from said plaintiff said taxes and in so doing will distrain, levy upon, and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing the plaintiff an irreparable

loss of such property and the goodwill of plaintiff's business, likewise mentioned in said bill of complaint and petition, and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy, and adequate remedy at law in the premises; that if said restraining order is not so issued, there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act, and that for all these reasons a preliminary restraining order should issue against the defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, as prayed for in said bill of complaint and petition,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1st. That said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, his officers, agents, servants, employes, and attorneys, and those in active concert or participation with him and who shall, by personal service or otherwise, have received actual notice hereof, shall be and they are and each of them is hereby enjoined and restrained from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff, Armour & Company, a corporation, any processing taxes now due from and payable by plaintiff under and pursuant to the said Agricultural Adjust-

ment Act adopted by the Seventy-third Congress of the United States, and being

"An act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes,"

which Act was approved on May 12, 1933, and all acts amendatory thereof; from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff any taxes hereafter to become due from and payable by plaintiff and arising under the terms of said Act on hogs processed by it; from imposing or collecting or attempting to impose or collect upon or from said plaintiff any interest or penalties on account of plaintiff's failure to pay any of said processing taxes payable by plaintiff under the force of the Act, whether now due or hereafter to become due from plaintiff; from imposing or filing or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non payment by plaintiff of any of said processing taxes, whether now due or hereafter to become due from plaintiff under the Act; from levying upon or distraining or selling plaintiff's slaughter house, packing plant, the machinery and appliances therein contained and used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and money in bank or any of such property or any other property of plaintiff on account or by reason of such non-

payment of said or any of said processing taxes, whether now due or hereafter to become due from and payable by said plaintiff under said Act, all from the date of the issuance of this preliminary injunction until the final decree of the Court in this case or until further order of this Court;

2nd. This injunction is granted upon the condition that the plaintiff shall furnish security to the defendant, Nat Rogan, as Collector of Internal Revenue, as aforesaid, by undertaking with sufficient sureties, to be approved by the Court, in the penal sum of $17,370.00, conditioned that plaintiff will pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court in the event it is finally decided this restraining order was improperly issued or this action is dismissed; provided that in lieu of such undertaking plaintiff shall have and is hereby given the option of depositing the said sum of $17,370.00 in lawful money of the United States with the Clerk of the above entitled Court, subject to like conditions; and upon the further condition that said plaintiff shall continue to file with said Nat Rogan, as said Collector of Internal Revenue, monthly returns on all hogs processed by it, as required by said Act, such returns to be made on the forms provided therefor by the said Collector of Internal Revenue; and file a bond or deposit with the Clerk the amount of the tax shown to be due by such return.

3rd. The Court, however, reserves the right to require additional security from plaintiff from time to time, as may seem to the Court necessary to protect the defendant, Nat Rogan, as said Collector of Internal Revenue, or to modify this order in any part or particular after notice to the parties hereto; and

4th. That the said motion of defendant to dismiss plaintiff's bill of complaint and petition for injunction is denied and defendant is allowed fifteen (15) days after notice hereof within which to answer said bill of complaint and petition for injunction.

Dated at Los Angeles, California, this 15th day of August, 1935.

By the Court.

PAUL J. McCORMICK
Judge of the said District Court

APPROVED AS TO FORM
CLYDE THOMAS
Asst. U. S. Atty.
Attorneys for Defendant.

Filed Aug. 15, 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

UNDERTAKING ON INJUNCTION

WHEREAS, the above named plaintiff has commenced the above entitled action and summons has issued therein, in the District Court of the United States, Southern District of California, Central Division, against the above named defendant, and whereas the said plaintiff has applied for and has been granted a preliminary injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described,

NOW, THEREFORE, Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and duly licensed to transact a general surety business in the State of California, in consideration of the premises and of the issuing of said injunction, undertakes, in the sum of seventeen thousand three hundred seventy dollars ($17,370.00), and promises to the effect, that in case said injunction shall issue the said plaintiff will pay to the said party enjoined all taxes chargeable against plaintiff on account of the matters and things described in said complaint, together with all costs assessed by the Court, in the event that it is finally decided that injunction was improperly issued or in the event that this action is dismissed, not exceeding, however, the total sum of seventeen thousand three hundred seventy dollars ($17,370.00).

IN WITNESS WHEREOF, the said Surety has caused its corporate name and seal to be hereunto affixed

by its duly authorized attorney-in-fact, at Los Angeles, California, on the 15th day of August, A. D. 1935.

MARYLAND CASUALTY COMPANY,

(Corporate Seal) By C. W. Keefer
Attorney-in-fact

I HEREBY APPROVE THE FOREGOING BOND
Dated: The 15th day of August, 1935.

Paul J McCormick
Judge

STATE OF CALIFORNIA,)
(SS:
County of Los Angeles.)

On this 15th day of August, A. D., 1935, before me, Frances B. Gray, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Keefer, known to me to be the Attorney-in-fact of the Maryland Casualty Company, the corporation that executed the within and foregoing instrument, and known to me to be the person who executed the within instrument on behalf of such corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Frances B. Gray (Seal)
Notary Public in and for the County of Los Angeles, State of California

My Commission Expires Jan. 6, 1938

[Endorsed]: Filed Aug 15 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE TEMPORARY INJUNCTION

TO ARMOUR & COMPANY, a corporation, plaintiff in the above entitled action, and

TO GIBSON, DUNN & CRUTCHER, its attorneys:

You, and each of you, will please take notice that the defendant above named will move the above entitled court, in the courtroom of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, on the 27 day of August, 1935, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the temporary injunction heretofore entered, on the grounds and for the reasons stated in said motion, copy of which is hereunto attached.

Dated: This 22 day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Received copy of the within document Aug 22 1935 Gibson, Dunn & Crutcher Per A

[Title of Court and Cause.]

MOTION TO VACATE TEMPORARY INJUNCTION.

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 15th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate, and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved ...., which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum

in excess of $1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plaintiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's Bill of Complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22d day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney,
Attorneys for Defendant.

CT:ah

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman, Clerk. By B. B. Hansen Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Tuesday, the 27th day of August, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, etc., et al.	)	
Defendants.	)	

The above and foregoing entitled and numbered causes coming before the Court, at this time, for hearing on Motions of defendants for Orders vacating and setting aside Temporary Injunctions heretofore entered, etc., pursuant to Notices filed August 22nd, 1935;

A. M. Randol is present and acts as the official stenographic reporter of the testimony and the proceedings, and the plaintiff in each of the above entitled causes being represented as follows, to-wit:

Geo. M. Breslin, Esq., appears for the plaintiff in Cases, Nos. Eq.-698-H and Eq.-708-J; J. E. Blum, Esq., appears for the plaintiff in Cases, Nos. Eq.-702-J, Eq.-703-H and

Eq.-719-C; W. Torrence Stockman, Esq., appears for the plaintiff in Cases, Nos. Eq.-710-H and Eq.-739-C; John C. Stick, Esq., appears for the plaintiff in Cases, Nos. Eq.-732-H and Eq.-733-M; Benjamin W. Shipman, Esq., appears for the plaintiff in Case No. Eq.-694-C; Attorneys Hibbard and Kleindienst appear for the plaintiff in Case No. Eq.-711-M; Leon Levy, Esq., appears for the plaintiff in Case No. Eq.-721-J; Leon Kaplan, Esq., appears for the plaintiff in Case No. Eq.-737-M; J. C. McFarland, Esq., appears for the plaintiff in Case No. Eq.-740-C; W. K. Tuller, Esq., appears for the plaintiff in Case No. Eq-741-J; and, Peirson M. Hall, U. S. Attorney, Clyde Thomas, Assistant U. S. Attorney, and Francis A. Le Sourd, Esq., Special Assistant to the U. S. Attorney General, all appearing for the respondents herein;

Now, at the hour of 11 o'clock a. m. counsel answer ready in all cases, whereupon, the Court orders hearing herein proceed; and

******(Argument of counsel)******.

At the hour of 4:55 o'clock p. m. the Court orders said Motions submitted for decision.

At a stated term, to-wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Friday the 30th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. MC CORMICK, District Judge.

Armour & Company, a corp.,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C
Nat Rogan, etc.,	)	
Defendant.	)	

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the regular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

[Title of Court and Cause.]

PETITION FOR RE-HEARING

TO Honorable Paul J. McCormick, Judge of the above entitled Court:

The petition of Armour & Company, a corporation, respectfully shows:

I.

That it has heretofore commenced a suit against the above-named defendants.

II.

That in the course of said suit and after due and proper showing, a temporary injunction was granted it, pending the determination and decision of said suit.

III.

That the decree granting the plaintiff such temporary injunction against any of the acts of the defendants in said injunction set forth, was made on or about the 9th day of August, 1935.

IV.

That thereafter, on or about the 30th day of August, 1935, your Honorable Court made and entered its Order dissolving said temporary injunction.

V.

That your petitioner states that the Order of your Honorable Court, so made and entered on or about the 30th day of August, 1935, is in error in the particulars set forth and specified in the attached Assignment of Errors.

Wherefore, your petitioner prays that a time and place be set by the Court for the purpose of hearing this petition and that, for such purpose, an Order to Show Cause should issue to defendants and their counsel, directing them to appear and show cause, if any they may have, why a re-hearing should not be had, and said Order dissolving the temporary injunction vacated, and said temporary injunction restored to its former full force and effect; and that your Honorable Court may make such other and further orders and decrees, during the hearing and after the hearing of the within petition, as to the Court may seem proper, and in accordance with the usages and precepts of equity.

Dated: September 9, 1935.

JOHN C. MACFARLAND
GIBSON, DUNN & CRUTCHER

By John C. MacFarland

Attorneys for Plaintiff, Armour & Company, a corporation petitioner herein.

It is ordered that said petition for rehearing be set for hearing on the 12th day of September, 1935 at 2 o'clock P. M. and that Notice of such hearing be given the defendant, or his attorney, not later than the 9th day of September, 1935.

Dated - Los Angeles, Calif, Sep. 9, 1935

Paul J. McCormick
Judge.

[Endorsed]: Received copy of the within Petition this 9th day of September, 1935 Peirson M. Hall, D. H. Attorney for Deft. Rogan. Filed Sep. 9 - 1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Thursday the 12th day of September in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Paul J. McCormick, District Judge.

ARMOUR & COMPANY a corporation,	)	
	)	
Plaintiff	)	No. 740-C
vs.	)	In Equity
NAT ROGAN, etc.	)	
Defendant	)	

These causes coming on for hearing on (1) Petition for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases, Nos. 698-H, 708-J, 710-H, and 740-C; George M. Breslin, Esq., appearing for the plaintiffs in cases, Nos. Eq. 698-H and Eq. 708-J; Benjamin W. Shipman, Esq., appears for the plaintiff in case No. Eq. 694-C; W. Torrence Stockman, Esq., appears for the plaintiff in Case No. Eq. 710-H; John C. MacFarland, Esq., appears for the plaintiff in Case, No. Eq. 740-C; and J. E. Blum, Esq., appearing for the plaintiffs in Cases, Nos. Eq. 702-J, Eq. 703-H, and Eq. 719-C; and Philip N. Krasne, Esq., appearing for the plaintiff in Case No. Eq. 737-M, Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock p. m. counsel answer ready in all matters; following which,

George M. Breslin, Esq., makes a statement, and

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to Motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p, m., George M. Breslin, Esq., argues to the Court in support of petitions for rehearing; after which,

At the hour of 2:30 o'clock p. m. Peirson M. Hall, Esq., argues to the Court in reply thereto.

At the hour of 3:10 o'clock, John C. MacFarland, Esq., makes closing argument in behalf of the plaintiffs; following which

At the hour of 3:15 o'clock p. m. J. E. Blum, Esq., makes a statement.

The Court now renders its oral opinion and orders that each Motion for rehearing be severally denied and exceptions allowed.

Upon Motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is order that Supplemental Bills of Complaint in Cases, Nos. Eq.-698-H and Eq.-708-J may be amended by interlineation.

[Title of Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

Comes now the plaintiff and with leave of Court files this, its supplemental complaint, and alleges:

I.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Section 21, subdivision (d) (1), and reading as follows:

"(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any over-payment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part

of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claims, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the Court. * * * *."

That by the enactment of said legislation plaintiff has been deprived of any adequate remedy at law to sue for the refund of processing taxes or to litigate before this Court or any other tribunal, the question of legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of process taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them. That said legislation imposes onerous conditions which cannot be complied with because evidence of all the facts which operate to affect the sales price of the commodity sold by plaintiff in respect to which the tax is imposed is not available and cannot be produced by plaintiff. That the said processing tax is assessed, levied and collected on the basis of the live weight of the commodity processed by plaintiff. That the said commodity, after being purchased by the plaintiff is converted into nine (9) major articles, and other miscellaneous ones which are affected by separate and distinct market trends and conditions of various fluctuations over periods of time varying in length with each article running from a period of a few days to several months. That upon such conversion of the said commodity into said articles the said commodity loses its

identity. That the prices obtained by plaintiff for said articles or products are determined by competition in open and free markets. That said prices fluctuate daily, and in some cases, hourly. That the determination of the extent to which the purchase price obtained by plaintiff might constitute or be properly held to constitute a portion of the processing tax theretofore paid by plaintiff involves the consideration of factors which it is impossible for plaintiff to establish by proof and that such inability does not arise from any failure on the part of plaintiff to keep accurate and complete records, but arises from circumstances beyond plaintiff's control, which determine the matter of marketing said product and the conditions thereof That by reason of the foregoing requirements of said Act, plaintiff would not be able to recover any part of the tax paid as the proof, the burden of which is placed upon plaintiff, cannot be made by it, and this without any fault on the part of plaintiff, and irrespective of the fact that plaintiff has lost money in the handling of its pork products during each month in which the said Agricultural Adjustment Act has been in operation.

That the purported right, as provided by said Act, to sue for a refund for the amount of tax not passed on, is purely illusory for the reason that an error in the computation of one cent in the amount claimed would result in the loss and forfeiture of the entire amount, even though said amount be several thousand dollars.

II.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment

to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Division 8 of Section 21, subdivision (d) (2), and reading as follows:

"(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceedings relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be

so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail."

That by reason of the enactment of the said Statute, plaintiff has no present remedy at law whatsoever, and is not permitted to sue for refund of processing taxes or to litigate in any tribunal the question of the constitutionality of said Agricultural Adjustment Act, or collection of processing taxes thereunder, or to recover any judgment for the refund thereof.

That under the provisions of said Act plaintiff is deprived of any right to obtain consideration for its claim for refund or recovery of the amount of any tax until after the Act is finally declared invalid. That plaintiff's claim, when filed, must be filed pursuant to rules and regulations of the Commissioner of Internal Revenue, with the approval of the Secretary, which rules have not been promulgated. That by the provisions of said Act the Commissioner of Internal Revenue, before whom such claims must be filed for recovery of refund, is given one year in which to pass thereon after the filing of such claim, and plaintiff cannot bring any action at law until after the period of one year from such filing unless the Commissioner of Internal Revenue has made his ruling upon plaintiff's claim prior to that time. That by reason of the said restriction upon plaintiff's right to sue for refund, there is no plain, speedy, or complete remedy at law, which is available to plaintiff.

WHEREFORE, plaintiff being without a plain, certain, and adequate remedy at law, and being able to obtain relief only in a court of equity prays for all relief sought in the original bill of complaint herein, and for all other and proper relief.

GIBSON, DUNN & CRUTCHER
J. C. MACFARLAND
By J. C. MACFARLAND
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. C. MACFARLAND being by me first duly sworn, deposes and says: That he is a member of the firm of Messrs. Gibson, Dunn & Crutcher, attorneys for the plaintiff in the above entitled action; that he has read the foregoing Supplemental Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this affidavit for the reason that all officers of plaintiff are at present absent from the County of Los Angeles where said firm has its offices.

J. C. MACFARLAND

Subscribed and sworn to before me
this 10th day of September, 1935.

MARY S. ALEXANDER
Notary Public in and for the County
of Los Angeles, State of California.

[Seal]

[Endorsed]: Filed Sep. 12, 1935 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk.

[Title of Court and Cause]

PETITION FOR APPEAL

To the Hon. Paul J. McCormick, District Judge of the United States, in and for the Southern District of California, Central Division:

The above named plaintiff, feeling itself aggrieved by the Order dissolving the temporary injunction made and entered in this cause on the 30th day of August, 1935, does hereby appeal from said Order vacating the temporary injunction heretofore issued in this suit, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and said plaintiff prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers, upon which said appeal has been based, duly authenticated, shall be sent to the Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper Order touching the security to be required of it to perfect its appeal be made.

And desiring to supersede the result and effect of the Order so made and granted whereby the temporary injunction heretofore granted to the plaintiff is dissolved, the plaintiff tenders bond in such amount as the Court may require for the purpose of preventing and staying the taking effect of said Order of Court and the dissolu-

tion of the temporary injunction heretofore granted, and prays that, with the allowance of the appeal, a supersedeas be issued staying the dissolution of the injunction pending the appeal hereby being taken from the Order dissolving the temporary injunction heretofore granted, and, further, prays that the effect of such supersedeas be that said temporary injunction be restored and placed in full force and effect for and during the period of the appeal to the same extent and in the same manner and with the same conditions and provisions as have, prior to such order of dissolution of said temporary injunction, been in effect and in force.

Dated: September 14, 1935

GIBSON, DUNN & CRUTCHER

By J. C. MacFarland

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Petition this 14th day of September, 1935 Peirson M. Hall D. H. Attorney for Rogan. Filed Sep 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

ARMOUR & COMPANY, a corporation, Plaintiff, -vs- NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 740-C In Equity ASSIGNMENT OF ERRORS

Now this 13th day of September, 1935, comes the plaintiff, Armour & Company, a corporation, and files this, its Assignment of Errors upon which it will rely in its appeal from the order dissolving the temporary injunction heretofore granted to the plaintiff, which order was made and entered in the above suit on the 30th day of August, 1935. Plaintiff states that the order dissolving the said temporary injunction was erroneous and unjust to the plaintiff in the particulars and for the reasons hereinafter set forth:

FIRST: The Court erred in dissolving said temporary injunction because the said order was not made or entered upon the Court's own motion, but solely upon the motion of the defendant, and without any showing by the defendant necessitating the dissolution of the injunction, and without any showing of change of conditions or circumstances occurring between the time of granting the temporary injunction and the date of said order dissolving

said temporary injunction which required any act by the Court in the exercise of its equitable powers.

SECOND: The Court erred in dissolving said temporary injunction because the circumstances and conditions which were set forth in plaintiff's complaint, and not contradicted by the record in said cause, and which allegations were found by the Court to be true, and which necessitated the granting of the temporary injunction, continued in existence at the time of the said order dissolving the said injunction.

THIRD: The Court erred in dissolving said temporary injunction because the plaintiff was entitled to the temporary injunction until the trial and determination of the suit and during pendency thereof; that said suit is still pending and no answer has been filed to plaintiff's Bill of Complaint by defendant, defendant's motion to dismiss the Bill of Complaint having been denied and the objections interposed by the defendant to the granting of the temporary injunction having been overruled.

FOURTH: The Court erred in dissolving said temporary injunction bceause the said order dissolving the temporary injunction theretofore granted was made by the Court upon the erroneous assumption that the decision or ruling of the United States Circuit Court of Appeals for the Ninth District, in the case of Fisher Flouring Mills Company, a corporation, v. Alex. McK. Vierhus, Individually and as Collector of Internal Revenue for the District of Washington, No. 7938, and companion cases, which decision or ruling was made on or about the 15th day of August, 1935, is binding and conclusive on District Courts of the United States located within the jurisdiction of said United States Circuit Court of Appeals for

the Ninth District, irrespective of the facts herein involved, admitted by the defendants, and found to be true by the Court in its order for temporary injunction, and which facts and recitals are different from and unlike the facts involved and considered by said United States Circuit Court of Appeals in the aforesaid case of Fisher v. Collector.

FIFTH: The Court erred in dissolving said temporary injunction because since the passage by Congress of H. R. 8492, which occurred subsequent to the decision of the Circuit Court of Appeals in the said case of Fisher Flouring Mills Company, a corporation, vs. Alex McK. Vierhus, etc., any remedy at law that plaintiff has heertofore possessed has been rendered so cumbersome, capricious, uncertain, unwieldy, and impossible of proof as to deprive the plaintiff of any and all remedy at law.

SIXTH: The Court erred in dissolving said temporary injunction because, since the passage of the Amendments to the Agricultural Adjustment Act embodied in H. R. 8492, any semblance of a remedy at law that the plaintiff formerly had is no longer in existence.

SEVENTH: The Court erred in dissolving said temporary injunction because the remedy to which plaintiff is relegated, through denial of injunctive relief pending trial, is harsh, oppressive, capricious, cumbersome and costly, entirely illusory, and of no practical or any relief.

EIGHTH: The Court erred in dissolving said temporary injunction because in the nature of the products handled and manufactured by the plaintiff from the commodity upon which the processing tax can be assessed, levied, and collected, it is impossible to determine what

portion, if any, of said processing tax is included in the sales price of the product which is manufactured from the commodity upon which said tax can be assessed, levied, or collected, and thereby plaintiff would not be able to recover any of the tax paid, as the proof, the burden of which is placed upon it by said Amendments to the Agricultural Adjustment Act, cannot be made by it; that such inability does not arise from any failure on the part of plaintiff to keep full, true, and complete records, but because the commodity is converted into various articles which are affected by separate and distinct market trends and conditions of various fluctuations, over periods of time varying in length with each article; and for the reason that while the tax is assessed, levied, and collected on a basis of the live weight of the commodity processed by the plaintiff, said commodity entirely loses its identity upon being converted into said various articles, and it is impossible, upon any sale of said articles which may have heretofore been made by plaintiff, or which may hereafter be made by plaintiff, to show or to produce any evidence whatsoever tending to show from what particular hog or hogs, the articles sold are derived, or to trace the said articles or merchandise involved in any sale back to the commodity processed by plaintiff and upon which the tax is paid.

NINTH: The Court erred in dissolving said temporary injunction because, if plaintiff's claim or claims for refund under the said Act as amended are refused and plaintiff thereupon files suit, the plaintiff is again confronted with the same limitations and restrictions which are imposed upon it in the making of claim, in that, in addition to any other proof required of it in the suit for the recovery of the tax, plaintiff must prove that it has not

passed any part of the tax, which proof is, from a practical standpoint, utterly impossible, whereas, in truth and in fact, it cannot pass the tax to the purchasers of its products as it has no control of the competitive markets in which its products must be sold, and has not done so; and defendants have admitted, by their failure to deny the allegations of the complaint, that plaintiff is unable to pass the processing tax it is compelled to pay or which is assessed against it.

TENTH: The Court erred in dissolving said temporary injunction because any remedy at law that plaintiff may have is not a full or complete or speedy remedy in that it is uncertain whether plaintiff can file any claim for refund or recovery of the amount of any tax or penalty at this time, or whether such claim can be filed only after the final determination of the invalidity of the law imposing the tax; and, in fact, no provision for filing of claims has been made, nor has any machinery for the consideration thereof been provided, except after the Act is finally declared invalid; no means are provided for the consideration of any such claim for refund or repayment of any tax or penalty by the Commissioner until after the law is declared finally invalid; such claim can only be considered in the manner in the Act provided, only after the Act, pursuant to which such tax is assessed, levied, and collected, is finally declared invalid, and the filing or attempted filing of a claim at any prior time would avail the plaintiff nothing and the Commissioner is given one year from the time such Act is declared invalid in which to pass upon the claim of the plaintiff; because the claimant is not permitted to bring any action until the expiry of one year from the time of filing of any claim

for recovery or refund, and such claim for recovery or refund cannot be considered until after the law under which the tax is assessed, levied, and collected has been finally held invalid; the running of the one year's time given to the Commissioner for the purpose of passing on the claim would be calculated from the time the Act under which such taxes are assessed, levied, or collected is finally held invalid if the claim has been filed prior thereto; no obligation is placed upon said Commissioner to determine said claim prior to the expiry of one year.

Until the Act is finally declared invalid, by reason of violating the provisions of the Constitution of the United States of America, or otherwise, plaintiff has no remedy of any sort at law, and, until such time, plaintiff, without intervention of equity, must pay the tax monthly on the basis promulgated by the Secretary of Agriculture, and await final decision as to whether said Act is invalid; that, only after the final determination of such invalidity, do any remedies at law come into being.

In addition to any other compliance with law, plaintiff, though having paid the tax, must show and establish to the satisfaction of the Commissioner of Internal Revenue that the tax paid, or any part thereof, has not been passed to the vendee in any manner whatever. That the commodity handled by the plaintiff, in relation to which processing taxes are assessed, is converted into numerous products and by-products, subject to many variable and various market conditions, and the burden imposed by the law upon plaintiff, in seeking refund, to establish that no part of said tax has been passed to the vendee is impossible of compliance.

The said amendments provide that the transcript of hearing before the Commissioner shall be filed in the Court in which plaintiff may be entitled to maintain any action in case the Commissioner finds that any part of the tax has been passed on in any form whatever to the vendee and shall constitute the record before said court. Plaintiff is required by the Act as amended to file a certified copy of the proceeding had before the Commissioner of Internal Revenue. The Commissioner of Internal Revenue is not a party to such litigation, and any conclusion of the Commissioner is not to be adduced and determined in accordance with the rules of law and the rules of evidence, and no provision of law exists requiring that the Commissioner, or any person conducting such hearing on his behalf, shall be skilled or versed in or have knowledge of rules of law and rules of evidence. On the contrary, such proof is required to be made to the Commissioner's satisfaction.

ELEVENTH: The Court erred in dissolving said temporary injunction because if said Agricultural Adjustment Act as amended is and shall be declared to be invalid, there is no appropriation of funds by Congress now available, or now provided to be available in the future, from which plaintiff has the right to be repaid or will be repaid any amount of processing taxes hereafter paid by it; that while said Act as Amended to date purports to appropriate money to the Secretary of Agriculture for the purpose, among others, of making refunds of processing taxes paid, said appropriation has been exhausted and exceeded by expenditures charged and chargeable

against it and nothing is available of said appropriation from which plaintiff can be paid.

TWELFTH: The Court erred in dissolving said temporary injunction because plaintiff cannot under the Amended Act pursue any remedy at law until the law has been finally declared unconstitutional, and cannot maintain any suit or action for recovery of any tax paid, in any event until action by the Commissioner of Internal Revenue, and the Commissioner of Internal Revenue need not take the action set forth in the Act until one year after the filing of claim; and even after the plaintiff is permitted to maintain an action under the law, the action, in its very nature, is not tried for some time after the bringing thereof; the proof required of plaintiff is detailed, cumbersome, and exacting to a prohibitive extent and, after judgment, an appeal may be had and taken upon issues having nothing to do with the illegality of the tax exacted from the plaintiff, and plaintiff has no way of being compensated for the harassment and vexatiousness imposed upon it.

Under the Amendments to said Act, if plaintiff were to pursue the remedy at law therein outlined and set forth, plaintiff would have no means of recovering the taxes collected under a law which plaintiff alleges to be illegal and invalid, and unconstitutional.

THIRTEENTH: The Court erred in dissolving said temporary injunction because irreparable injury and damage will be suffered by the plaintiff unless plaintiff has

injunctive relief during the pendency of the suit and until its trial and determination, particularly because plaintiff will be compelled to engage in the prosecution of many suits for the recovery of money paid by way of said processing taxes.

Said processing taxes will be payable monthly, and each month constitutes a separate taxable period under the Act as amended. Plaintiff would be compelled to file claim for refund appertaining to each taxable period and, irrespective of the illegality of the processing taxes and the Act of Congress by virtue of which such taxes are assessed, levied and collected, engage in and have placed upon it the cumbersome requirement of showing whether any portion of the tax has been included in the sales price of any of the commodity upon which it is liable for or pays processing taxes; that under the requirements of said Act, claimant is forced to preserve as fully as possible whatever evidence is obtainable as to each transaction of purchase and sale occurring during each month, and plaintiff will be required to bring proceedings involving separate issues as to each said taxable period of one month.

FOURTEENTH: The Court erred in dissolving said temporary injunction because the Court had power to restrain the assessment, levy, or collection of the said tax which is invalid, unlawful, and unconstitutional for the reasons set forth in plaintiff's complaint and under the circumstances found by the Court to be true, establishing plaintiff's right to equitable relief, the Court was not au-

thorized, upon defendant's motion, without any showing of change of circumstances or consideration of the facts entitling the plaintiff to such relief to vacate said Order solely upon the ground that the Ninth Circuit Court of Appeals in a decision involving an application for an injunction pending appeal by another processor upon a record presenting facts in no wise similar to those involved in the present case, had denied such injunction.

FIFTEENTH: The Court erred in dissolving said temporary injunction because unless the Collector of Internal Revenue is restrained in a manner similar to that ordered in the temporary injunction in force herein prior to the Order of the Court, said Collector will file liens upon the property, chattels, goods, wares, merchandise, and assets of plaintiff, and will enter upon its property for the purpose of distraining and selling it, all of which will destroy plaintiff's business, custom, good will, and credit, for which it cannot be adequately or speedily or completely compensated in damages. That these acts of the Collector of Internal Revenue will be repetitive and will appertain to each taxable period of one month each and that, further, in the nature thereof, a trespass upon the property, lands, and tenements of the plaintiff will take place and occur each time the Collector will exercise, as he threatens to do, the things and matters he is required to do under the law in the collection of said processing taxes; that, in each instance, such trespass will occur and be committed, not only by the Collector, but by his agents,

servants, attorneys, deputies, and employees, who are numerous, and such trespass, in each instance, need not occur by the same individuals, but will likely be done and committed by other and different agents, servants, attorneys, deputies, and employees of said Collector, and, in each instance, if the law under which such assessment, levy, and collection is made is declared to be unconstitutional, a different set of individuals, acting as such agents, servants, attorneys, deputies, and employees, may be guilty of trespass and give rise to numerous and various causes and rights of action against such trespassers, and compel the plaintiff to engage in many actions for the relief therefor, all of which are slow and tedious and may be against persons unable to respond in damages, and any such remedy that plaintiff may have will be but an empty remedy and of no avail to it.

SIXTEENTH: The Court erred in dissolving said temporary injunction because the method of seeking relief so placed upon the plaintiff as a taxpayer amounts to a circuitous method of collecting unlawful taxes levied beyond any power of Congress, as given to Congress by the Constitution of the United States of America, and to compel plaintiff to follow the procedure of a purported action at law is simply to deny plaintiff all relief and to subject it to harassment, cost, and great difficulty or proof upon matters appertaining to entirely novel and vexatious accounting matters, not subject to any ready or definite standard, and involving many disputatious elements.

SEVENTEENTH: The Court erred in dissolving said temporary injunction because the Order dissolving the temporary injunction heretofore granted to the plaintiff herein will, in effect, result in taking the property of the plaintiff without due process of law, in that, after taking the property of the plaintiff in satisfaction of the taxes assessed and levied under said Agricultural Adjustment Act, as amended, the remedies provided to the plaintiff, and which plaintiff would be compelled to pursue, where injunctive relief is denied to it, are so cumbersome, costly, and limited and uncertain as to amount to a denial of any relief to it.

EIGHTEENTH: The Court erred in dissolving said temporary injunction because, ever since the assessment, levy, and collection of taxes under the Agricultural Adjustment Act, plaintiff has suffered loss as a processor of hogs, due solely and directly to the tax imposed thereunder, which has prevented plaintiff from earning, during said period, an adequate or reasonable return upon the value of its investment in said business.

The processing taxes imposed are so heavy that the payment of such taxes will, with each payment, tend to diminish the capital of the plaintiff, and to restrict and diminish its operations, and plaintiff will, in the nature of things, be compelled to restrict its business, or, if it abandons its hog processing business, it will be unable to compete with others engaged in a like line of business. That such results will flow naturally, proximately, and

directly by reason of the imposition and collection of said taxes, which are void, invalid, and unconstitutional, in that the Agricultural Adjustment Act, particularly in the respects wherein this plaintiff is concerned, is invalid, unlawful, and unconstitutional, for the reasons and in the particulars set forth in plaintiff's complaint herein.

NINETEENTH: The Court erred in dissolving said temporary injunction because great harm and irreparable injury will be suffered by plaintiff by reason of the dissolution of the temporary injunction and no harm or loss can be incurred or suffered by defendant by its continuance; such obligations as have been incurred by the Secretary of Agriculture were incurred prior to the assessment or levy or collection of any so-called taxes from the plaintiff and no opportunity exists or has been accorded plaintiff to agree to, discuss or in any wise participate or act upon or in connection with the incurring of such obligations, and the sum sought to be levied against and collected from the plaintiff in the guise of such taxes are for the purpose of the payment of such obligations of the Secretary of Agriculture incurred, and which obligations were not incurred in the course of any valid or lawful authority vested in said Secretary of Agriculture.

TWENTIETH: The Court erred in dissolving said temporary injunction because non-compliance by the plaintiff with the Act of Congress set forth in plaintiff's suit, which violation will consist in the non-payment of the taxes imposed under said Act, will subject the plaintiff to great harassment and oppression, and to fines and

penalties, and subject its officers to criminal prosecution therefor.

WHEREFORE, plaintiff prays that the order and decision dissolving the temporary injunction be reversed, and that the Court make such orders as may be necessary or proper to afford plaintiff the relief to which it is entitled and that speedy justice be done to the parties in that behalf.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER,
By J. C. Macfarland
Attorneys for Plaintiff

IRA C. POWERS
Of Counsel

We, the undersigned attorneys, certify that the foregoing Assignment of Errors is made on behalf of the plaintiff, Armour & Company, a corporation, and is, in our opinion, well taken, and the same now constitutes the Assignment of Errors upon which it will rely in its prosecution of the appeal herein.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER
By J. C. Macfarland
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Assignment of Errors this 14th day of September 1935 Peirson M. Hall D H Attorney for Rogan.

Filed Sep 14 1935 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On motion of Gibson, Dunn & Crutcher and J. C. Macfarland, attorneys for plaintiff, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made and entered on August 30, 1935, dissolving the temporary injunction granted heretofore to the plaintiff in the above entitled suit, on or about the 8th day of August, 1935, be and the same is hereby allowed, and that a certified transcript of the record and all proceedings, papers, instruments, and documents herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit;

That, in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the temporary injunction heretofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, should be pursued by the plaintiff in the form of an application for an

injunction pending appeal to be presented to said United States Circuit of Appeals for the Ninth Circuit if the plaintiff wishes to secure such relief.

It is, further, ordered that the cost bond on appeal be fixed in the sum of $250.00.

Dated: September 14th, 1935.

PAUL J. McCORMICK
Judge of said District Court

[Endorsed]: Received copy of the within order this 14th day of September 1935. Peirson M. Hall, D. H. Attorney for Rogan.

Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That the Maryland Casualty Company, a corporation, organized and existing under the laws of the State of Maryland and duly licensed to transact a general surety business in the State of California is held and firmly bound in the penal sum of Two Hundred Fifty Dollars ($250.00) to be paid to defendants, for which payment well and *truly made,* said Maryland Casualty Company binds itself, its successors and assigns by these presents.

The condition of the foregoing bond is such that

WHEREAS on the 30th day of August, 1935, in the District Court of the United States in and for the Southern District of California in a suit pending in that Court wherein Armour & Company, a corporation, was complainant, and Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, was the defendant, an Order and decision was rendered dissolving the temporary injunction theretofore granted herein, and said Armour & Company, a corporation, having been granted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said Order and decision made and entered herein.

NOW, THEREFORE, the condition of this obligation is such that if the said Armour & Company, a corporation, shall prosecute its appeal to effect and answer all costs, if it shall fail to make its plea good, then this obligation shall be void, else to remain in full force and effect.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officers in the County of Los Angeles, State of California, this 6th day of September, 1935.

Maryland Casualty Company

[Seal] By Frances Gray

FRANCES GRAY,
Attorney-in-Fact.

The above bond approved this 14th day of Sept 1935.

Paul J. McCormick

Judge of the District Court of the United States for the Southern District of California

THE PREMIUM CHARGED
FOR THIS BOND IS $10.00.

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 6th day of September, in the year one thousand nine hundred and thirty-five, before me L. W. SUDMEIER, a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared FRANCES GRAY known to me to be the duly authorized Attorney-in-Fact of MARYLAND CASUALTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Corporation, and the said FRANCES GRAY acknowledged to me that he subscribed the name of the MARYLAND CASUALTY COMPANY as Surety, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] L. W. Sudmeier
Notary Public in and for said County and State

My Commission Expires April 14, 1936.

[Endorsed]: Filed Sep 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PRAECIPE

TO R. S. ZIMMERMAN, ESQ., CLERK OF THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Please prepare transcript of record in the above entitled cause to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit under appeal allowed September 14, 1935, and include therein papers, documents and records in said cause as follows:

1. Bill of complaint.
2. Supplemental complaint.
3. Order to show cause issued August 3, 1935.
4. Temporary restraining order.
5. Undertaking on injunction.
6. Order granting temporary injunction.
7. Notice of motion to vacate temporary injunction.
8. Order vacating temporary injunction.
9. All orders and minute entries of the Court herein.
10. Plaintiff's petition for appeal.
11. Plaintiff's assignment of errors.

12. Order allowing appeal.

13. *Certificate* issued returnable to United States Circuit Court of Appeals for the Ninth Circuit.

14. This praecipe.

15. Clerk's final certificate.

J. C. MACFARLAND,
GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland
Attorneys for Plaintiff

IRA C. POWERS
Of Counsel

[Endorsed]: Received copy of the within Praecipe this 14th day of September 1935 Peirson M. Hall, D. H. attorney for defendant Rogan. Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AMENDING PRAECIPE

It is hereby stipulated by and between the parties to the above entitled action that the praecipe for the transcript of record to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit under an appeal allowed September 14, 1935, may be amended by adding thereto the following items: (1) objections to granting of preliminary injunction, (2) motion to dismiss, (3) motion to vacate temporary injunction, (4) petition for rehearing (assignment of errors omitted), and that the same be included in the record on appeal.

J. C. MACFARLAND,
GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland
Attorneys for Plaintiff.

Ira C. Powers
Of Counsel

Peirson M. Hall
PEIRSON M. HALL
Clyde Thomas
CLYDE THOMAS
Attorneys for Defendant.

[Endorsed]: Filed Sep 28 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 103 pages, numbered from 1 to 103, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint and petition for injunction; order to show cause; objections to the granting of a preliminary injunction; motion to dismiss; minute order of August 9, 1935 re order to show cause why preliminary injunction prayed for in bill of complaint should not issue, etc.; temporary injunction; undertaking on injunction; notice of motion to vacate temporary injunction; motion to vacate temporary injunction; minute order of August 27, 1935 re hearing on motions of defendants for orders vacating and setting aside temporary injunctions heretofore entered, etc.; minute order of August 30, 1935 containing memorandum of conclusions made by Judge McCormick; petition for rehearing; minute order of September 12, 1935, re petition for rehearing, hearing on motions to file supplemental bills of complaint, ordering filing of supplemental bills of complaint, oral opinion and orders each motion for rehearing severally denied, etc.; supplemental bill of complaint; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal; praecipe and stipulation amending praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By .

Deputy.